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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No.

TRAP ROCK INDUSTRIES, INC.,

Petitioner,

vs.

JOHN C. KOHL, Commissioner of Transportation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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OCTOBER TERM, 1972

Docket No.

TRAP ROCK INDUSTRIES, INC.,

Petitioner,

vs.

JOHN C. KOHL, Commissioner of Transportation,

Respondent.

Petitioner, Trap Rock Industries, Inc. (hereinafter referred to as "Trap Rock"), a New Jersey corporation, prays that a writ of *certiorari* issue to review the judgment of the New Jersey Supreme Court entered in this case on May 7, 1973.

Opinion Below

On March 16, 1972, the New Jersey Commissioner of Transportation (hereinafter referred to as "Commissioner") issued a written determination and order debar-

ring Petitioner for five years from bidding, subcontracting, or supplying material on New Jersey Department of Transportation (D.O.T.) construction contracts, as well as State-funded county and municipal contracts (Appendix C). Petitioner appealed to the New Jersey Supreme Court, Appellate Division and on July 5, 1972 that court issued an opinion reversing so much of the Commissioner's order as debarred Petitioner from participating in municipal and county work but affirming the Commissioner's order in all other respects. *Trap Rock Industries, Inc.* v. *Kohl,* 120 N. J. Super. 8, 293 A. 2d 215 (App. Div. 1972), reproduced herein as Appendix B. After granting cross-petitions for certification, the New Jersey Supreme Court issued a written opinion and mandate, reversing that portion of the Appellate Division's opinion which had set aside the debarment of Petitioner with respect to county and municipal contracts, and in effect, reinstating the original order of the Commissioner. *Trap Rock Industries, Inc.* v. *Kohl,* 63 N. J. 1 (1973), reproduced herein as Appendix A. That opinion is the subject of review in this Petition.

Jurisdiction

The May 7, 1973 judgment of the New Jersey Supreme Court of which Petitioner seeks review is contained in the written opinion of that court, appearing herein as Appendix "A".

The jurisdiction of this Court is invoked under 28 *U.S.C.* Sec. 1257 (3) which allows review by writ of *certiorari* of any final judgment of the highest court of a State where any right, privilege or immunity is specially set up or claimed under the United States Constitution. Review is also sought pursuant to this Court's Rule 19(1)(a) which sets forth as a consideration for

granting the writ a state court decision on a substantial federal question either undetermined previously by this Court or decided in a way probably at variance with its applicable decisions. Additionally, Petitioner claims jurisdiction under 28 *U.S.C.* Sec. 2101(c) and this Court's Rule 23 allowing the filing of a petition for a writ of *certiorari* in a civil action within ninety days after the entry of the judgment sought to be reviewed.

Questions Presented

1. Does the Commissioner's order to debar the Petitioner, especially in light of the permanent nature and grave consequences of such a sanction, violate Petitioner's rights under the due process clause of the Federal constitution, since it was promulgated in the absence of any statutory or regulatory standards setting forth, among other things, the Commissioner's authority to debar and the conduct proscribed.
2. Does the Commissioner's order violate Petitioner's rights to equal protection of the laws since it was promulgated pursuant to an alleged policy to debar contractors and materialmen lacking in moral integrity, when, at the same time, the State willingly contracted with publicly known and self-admitted violators of New Jersey's bribery and conspiracy laws.

Constitutional Provisions Involved

Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, § 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner is a corporation of the State of New Jersey, having as its principal assets three stone quarries located in the municipalities of Kingston, Pennington, and Lambertville, New Jersey, and collectively supplying more than one-third of the stone used throughout the State of New Jersey. The company employs approximately 500 persons and has a weekly payroll of approximately $100,000.

On March 29, 1971, the Commissioner of Transportation of the State of New Jersey notified Petitioner that

its status as a pre-qualified bidder and its right to bid on New Jersey Department of Transportation contracts was suspended. The reason for the suspension as set forth in the Commissioner's notice was the fact that Michael J. Stavola, president of Petitioner and an 80 percent stockholder thereof, had been indicted for alleged bribery, obstructing justice and attempting to cause misconduct of a State officer, which indictment in the opinion of the Commissioner "would affect the responsibility of Trap Rock Industries, Inc. . . . "

The question of whether the Commissioner had acted within his authority in suspending Petitioner's right to bid, consistent with the protections of the Fifth and Fourteenth Amendments of the United States Constitution, was decided adversely to Petitioner by the Supreme Court of New Jersey in a reported decision filed November 23, 1971. *Trap Rock Industries, Inc.* v. *Kohl,* 59 N. J. 471 (1971), *cert. den.,* 405 U. S. 1065 (1972).

On November 22, 1971, Michael J. Stavola was found guilty of bribery and obstructing justice by a Superior Court jury of Monmouth County. On January 28, 1972, he was sentenced to a term of not less than one nor more than two years imprisonment. The validity of that conviction is presently on direct appeal before the Superior Court of New Jersey, Appellate Division.

On February 15, 1972, the Commissioner of Transportation convened a hearing in which he summond Michael J. Stavola and all companies with which he was associated. The purpose of the hearing was to determine whether, in the light of the conviction of Mr. Stavola, the State would continue or begin any new business relationships with Petitioner.

On March 16, 1972, the Commissioner entered an order debarring Petitioner:

> "from bidding on any contract with the Department of Transportation or any contract with county or municipal bodies which utilize or propose to utilize State funds, subcontracting on such contracts, or providing materials for such contracts, for a period of five years to run from May 7, 1971 . . ." (Appendix C).

The Commissioner's Order of March 16, 1972, was appealed to the New Jersey Superior Court, Appellate Division. On July 5, 1972, that court rendered a decision reversing so much of the Commissioner's Order as debarred petitioner from participating in municipal and county work but affirming the Order in all other respects. *Trap Rock Industries, Inc.* v. *Kohl,* 120 N. J. Super. 8 (App. Div. 1972).

Following the granting of cross-petitions for certification, the Supreme Court of New Jersey, on May 7, 1973, returned a decision which reversed so much of the earlier decision of the Appellate Division as had set aside the debarment of Petitioner with respect to county and municipal contracts and thereby affirmed the original order of the Commissioner. *Trap Rock Industries, Inc.* v. *Kohl,* 63 N. J. 1 (1973).

It should be noted that on June 29, 1973, the Commissioner lifted the debarment against Petitioner based on the complete divestiture of Michael J. Stavola of any interest in Trap Rock Industries, Inc. It must be further noted that this action was taken, with the State's consent, without prejudice to Petitioner's right to petition to this Court. See the excerpt of transcript from hearing before the Commissioner, June 14, 1973, appended hereto as Appendix "M". Therefore, Petitioner's right to appeal has not been mooted by the aforementioned order. Petitioner retains a legal interest in the return of Mr. Stavola as an officer of the corporation.

The question as to whether Petitioner had been denied the equal protection of the laws was first raised

in the state courts before the Appellate Division of the Superior Court of New Jersey in a motion for a rehearing and alternatively for a stay of the judgment of the Appellate Division. It is noteworthy that Petitioner requested the Appellate Division, in the alternative, for a factual hearing to develop its evidence should the court deem its motion inappropriate (See Appendix "H"). In that motion, Petitioner set forth newly discovered information which cast doubt upon the existence of a uniformly fair and even-handed administration of the State's alleged unwritten policy of refusing to deal with corporations of questionable moral integrity. See Affidavit of Justin P. Walder, Esq., appended hereto as Appendix "H" and letter of Justin P. Walder, Esq., to the New Jersey Supreme court, dated January 18, 1973, appended hereto as Appendix "I". These documents, the substance of which was never controverted by the Commissioner, revealed that D.O.T. was carrying on contractual relationships with publicly known and self-admitted violators of New Jersey's bribery and conspiracy statutes, and at the same time refused to contract with Petitioner on the sole basis that Mr. Stavola was lacking in moral integrity. The Appellate Division denied Petitioner's motion as untimely and the Supreme Court of New Jersey affirmed (See Appendix "A").

The questions of whether Petitioner could be debarred as a materialman on D.O.T. contracts (as opposed to a bidder or direct contractor), or in any manner on a county or municipal level, were first raised in the second hearing before the Commissioner on February 15, 1972. It was never an issue in the first hearing before the Commissioner or in the appeals therefrom. Although there are no express New Jersey statutes or administrative regulations authorizing the Commissioner to prequalify subcontractors or materialmen, either on a local or State level, or to prequalify contractors, subcontractors or mate-

rialmen for local county and municipal contracting work, the court below, relying on its prior decision of November 23, 1971, found that the statutes regarding the Commissioner's authority relating to contracts with the Department of Transportation were sufficient to cover materialmen, even on a county or municipal level (See Appendices "A" and "F". See also N.J.S. 27:7-35 *et seq.* and D.O.T.'s Standard Specifications for Highway and Bridge Construction (Appendix "J")). Those statutes and regulations simply relate to general powers of the Commissioner with regard to bidders for contracts with D.O.T. and do not purport to deal with local contracts or materialmen. More specifically, no statutory or regulatory standards are set forth which, consistent with due process, apprised Petitioner of the penalty it might incur as a result of Mr. Stavola's conviction.

Reasons for the Writ

I

The Commissioner's order to debar the Petitioner, especially in light of the permanent nature and grave consequences of such a sanction, violates Petitioner's rights under the Due Process Clause of the Federal Constitution, since it was promulgated in the absence of any statutory or regulatory standards setting forth, among other things, the Commissioner's authority to debar and the conduct proscribed.

The doctrine of procedural due process is the judicially created notion that when Government acts so as to affect substantial and protected individual interests, the Due Process Clause requires, in the absence of significant countervailing Government interests, that Government supply

procedures which guarantee at least a modicum of fairness. *Cooley* v. *Bd. of Ed. of Forrest City School Dist.*, 453 F. 2d 282 (8 Cir. 1972). It has been recognized that those corporations that have had existing contractual relationships with a public administrative agency typically have a substantial protected interest in the continuation of that contractual relationship. That interest arises from the very dependency for economic life of those corporations on their contractual relationships with the Government. See *Home Brothers, Inc.* v. *Laird*, 467 F. 2d 1268 (D. C. Cir. 1972); *Gonzalez* v. *Freeman*, 334 F. 2d. 570 (D. C. Cir. 1964); *Cooper Plumbing and Heating Co.* v. *Campbell*, 290 F. 2d. 368 (D. C. Cir. 1961); Grossbaum, "Procedural Fairness in Public Contracts", 57 Va. L. Rev. 171 (1971). As noted by Chief Justice Berger in *Gonzalez*, *supra*:

> "The impact of debarment on a contractor may be a sudden contraction of bank credit, adverse impact on market price of shares of listed stock, if any, and critical uneasiness of creditors generally to say nothing of 'loss of face' in the business community. These consequences are in addition to the loss of specific profits from the business denied as a result of debarment . . . we strain at no concept of judicial notice to acknowledge these basic facts of economic life." (334 F. 2d at 574).

It should be noted that there is an important distinction between the types of rules and regulations which would apply to debarment as opposed to a suspension which was at issue in the first *Trap Rock* case. (Appendix F). In suspension matters, a much wider range of administrative discretion may be granted because suspension is a limited, temporary expedient designed to protect the public interest until further investigation is complete. In debarment

proceedings the full "life or death" power of the government, as it was described in *Gonzalez,* is directed at an individual or a business. Thus, the limits of the exercise of such discretion must be made absolutely clear and precise. It would be unfair, then, to compare the suspension issues raised in the first *Trap Rock* case with the debarment issues raised herein.

It is submitted that the opinion below was erroneous in its reliance on the "general statutory theme" of Title 27, authorizing the Commissioner to "prescribe the standards and exercise supervision and control of State-aided work", to justify the particular debarment in this matter. (See Appendix A6a). As conceded by the court, none of the provisions cited speak explicitly on the subject of moral responsibility. Furthermore, none of the provisions explicitly authorize debarment, particularly of the breadth imposed on Petitioner.

In view of the permanent nature and grave consequences inherent in debarment, public contractors threatened with that sanction must be given every benefit of procedural due process before it becomes effective. *Gonzalez* v. *Freeman, supra.* Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); Grossbaum, *supra* at 237. Fundamental fairness requires that administrative agencies empowered to debar exercise those powers pursuant to rules and regulations setting forth clear standards and procedures. In *Gonzalez, supra,* Chief Justice Berger, noting the grave consequences of debarment, determined that debarment in that case could not be upheld on the basis that the agency involved had promulgated no rules or regulations to carry its power into effect as required by the Administrative Procedure Act. *Gonzalez* v. *Freeman, supra* at 577-580.

In reaching its decision to invalidate the debarment, the court in *Gonzalez* relied upon a balancing of interest

test. Thus, the Court weighed how the individual might be damaged against how, if at all, government interest might be affected by requiring procedural safeguards. It was concluded that the damage to the individual was so severe that fundamental fairness required prior promulgated regulations establishing ascertainable standards. Compare *Schlesinger* v. *Gates,* 249 F. 2d. 111 (D. C. Cir. 1957), *cert. den.* 355 U. S. 939 (1958) where a debarment was upheld specifically upon the ground that it was clearly authorized by existing published regulations.

Under the same balancing of interest test utilized by the court in *Gonzalez,* insofar as the Commissioner's debarment of Petitioner as a materialman is concerned, the governmental interest is ephemeral, if not non-existent, in the instant matter. This is so because the State is protected by performance bonds, its own inspectors and its pre-qualified contractors who are the only ones with whom the State directly deals. Also, as to local governing bodies, even those using State aid, the New Jersey statutes, embodying the policy of home rule, give local governments the exclusive discretion to determine qualifications so that no heavy State interest exists which the Commissioner need protect. See N.J.S. 40:25-1 *et seq.* Of course, as to pre-qualification at the State level, there is no present direct relationship between the Commissioner and Petitioner.

On the other hand, as a result of the debarment order, the business of Petitioner, which depends almost exclusively on public work, faces extinction. Approximately 500 employees on the weekly payroll face unemployment. Furthermore, as the Commissioner found in his determination of March 16, 1972, Michael J. Stavola had very little to do with the day-to-day operation of Petitioner.

Also, the quality of materials supplied by Petitioner are approved by D.O.T., and the crime for which Stavola was convicted had no relation to Petitioner's public work. Under the facts herein, no damage would result to the State and great damage would be foisted upon Petitioner should the debarment be sustained. Thus, applying the balancing of interest test, in the absence of sufficient procedural safeguards and prior promulgated regulations establishing clear standards, debarment in the instant case would violate due process.

In *Gonzalez, supra,* several companies which had existing contractual relationships with the agency involved had been debarred because of a criminal conviction by a plea of guilty of the principal of those corporations. The Court held that in the absence of rules and regulations setting forth standards and procedures, the debarment could not be upheld. *Gonzalez* v. *Freeman, supra,* at 577-580.

As noted above, there are no statutory or administrative standards set forth in any New Jersey statutes, rules or regulations which (a) expressly establish the authority of the Commissioner to debar materialmen from working on State-funded projects, or (b) expressly authorize the Commissioner to debar bidders, materials suppliers, or other participants in municipal and county procurement. Furthermore, no standards whatsoever are set forth as to what criteria are to be utilized in determining debarment or what procedures are to be utilized in that determination.

In contrast, the Federal Procurement Regulations (FPR), 41 C.F.R. 1-1.000 to 1-30.710 (1972) set forth in explicit detail those causes justifying debarment (Sec. 1-1.604), the procedural requirements relating to the im-

position of debarment (Sec. 1-1.604-1), and the specific standards applicable thereto. See pertinent Federal Procurement Regulations reproduced herein as Appendix "J". It is clear that no such specific rules or regulations exist with regard to the Commissioner and his powers. The Commissioner's actions in this matter were taken pursuant to D.O.T.'s allegedly unwritten policy of debarring those corporations lacking moral integrity. As stated previously, the Commissioner's authority is purportedly grounded in the general terms of Title 27, specifically, N.J.S.A. 27:7-35.1 *et seq.* As also stated above, those statutes relate to the prequalifications of bidders as opposed to material suppliers, and in particular, bidders on contracts with D.O.T., as opposed to those contracting on a local level. It is submitted that, contrary to the view of the court below, the general terms of Title 27 are insufficient, within the confines of due process, to allow the Commissioner to debar Petitioner from acting as a materialman on D.O.T. projects or from acting as a contractor, subcontractor or materialman for State-funded municipal and county projects.

The importance of rules and regulations is clear in a case such as that at bar where a five year debarment was imposed. No standards whatsoever exist as to length of time of debarment or under what circumstances the acts of an individual may be imputed to corporations, if at all. (It is interesting that the duration of debarment exceeded the sentence of 1-2 years imposed on Stavola himself). The Federal Procurement Regulations meet these issues. Thus, for example, imputation of individual action is accomplished only where the conduct is done in the course of official duty or with the knowledge and approval of the firm. See 41 *C.F.R.* Sec. 1-1.604.1 (c)(3).

Also, the period of debarment is governed by rule, 41 C.F.R. Sec. 1-1.604(c), and limited therein to three years. Debarment is to be based on the seriousness of the offense, or failure or inadequacy of contract performance. Moreover, the types of activities from which a firm may be debarred should be made clear in the rules. Thus, the federal regulations concern themselves only with the award of contracts. Significantly, the Federal Procurement Regulations do not debar materials suppliers but reach only contractors and subcontractors. See 41 *C.F.R.* Sec. 1-1.601-1. (See FRP, Appendix K).

As this Court has long recognized, the most basic element of due process of law, especially where sanctions may be involved, is that prohibited conduct should be clearly set forth in advance of any proceeding to impose a penalty. See *Cox* v. *Louisiana*, 379 U. S. 559, 574 (1965). The requirement for clear standards was reiterated in *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971), in which this Court held unconstitutional as a violation of due process of law a statute which imposed a penalty without applying any standard of conduct which could guide one in avoiding the sanction. Where inherent power exists under a grant of authority, but no standards have been established under which to carry out such power, an administrative agency is estopped by the demands of due process from imposing sanctions, since the essential element of due process—notice—is absent. *Gonzalez* v. *Freeman, supra; cf. Parducci* v. *Rutland*, 316 F. Supp. 352, 357 (N. D. Ala. 1970).

It is no argument that such regulations would be too cumbersome, as was suggested by the New Jersey Supreme Court (Appendix A). The Federal Procurement Act regulations concerning suspended, debarred or ineligible bidders are contained in less than six pages of

the Code of Federal Regulations. By comparison the Commissioner's *Standard Specifications* is a hard-bound volume of 474 pages. It is not contended that every permutation of human activity must be catalogued in regulations. Compare *Trap Rock* v. *Kohl, supra,* 284 A. 2d. at p. 167, where it was said that every situation which might bespeak lack of moral integrity need not be specifically set forth in exhaustive detail. Rather, the assertion of Petitioner is that there is no guidance whatsoever as to debarment, and for that reason it is *per se* arbitrary. *Gonzalez* v. *Freeman, supra.*

In *Gonzalez* v. *Freeman,* the Court held that because of the severe economic effects of a five year debarment the exercise of such power "cannot be left to administrative improvisation on a case-by-case basis." 334 F. 2d. at 578. Thus, the promulgation of rules and regulations setting standards and procedures beforehand was held to be required if such an exercise of governmental power was to be in accord with basic fairness.

It should be noted that Petitioner herein was never notified by the Commissioner that his hearing would encompass the questions of debarment from supplying materials or debarment from county and municipal contracts. The February 9, 1972 notice of the proposed debarment of Petitioner was limited by its terms to "debarment . . . from bidding upon any procurement requirements with agencies of the State of New Jersey under [the jurisdiction of the Commissioner of Transportation, the State Treasurer and the Commissioner of Environmental Protection]". (See February 9, 1972 notice appended hereto as Appendix L). At the February 15, 1972 hearing, no notice was given of any concern with local contracts. The Commissioner in his determination and order, however, sought to extend the reach of his

jurisdiction to include functions properly executed by county and municipal governments, secured for them by the doctrine of home rule.

Certainly, Due Process of Law required sufficient notice of the debarment sought. Since no notice had been given, no evidence was presented relevant to these points and Petitioner has been gravely prejudiced for it has had no opportunity to attempt to demonstrate to the Commissioner, by evidence or otherwise, the impropriety of his consideration of issues properly within the discretion of county and municipal officials.

In view of the above analysis, it is clear that Petitioner's debarment was accomplished without sufficient procedural safeguards. The complete lack of ascertainable standards cited above as well as the failure to properly notice Petitioner, rendered the debarment invalid under the Due Process Clause of the Fifth and Fourteenth Amendments.

II

The Commissioner's order violates Petitioner's rights to equal protection of the law since it was promulgated pursuant to an alleged policy to debar contractors and materialmen lacking in moral integrity, when, at the same time, the State willingly contracted with publicly known and self-admitted violators of New Jersey's bribery and conspiracy laws.

It is a fundamental principle of our Constitution that all citizens are entitled to equal protection of the laws, arbitrary and discriminatory fashion. *U. S. Const.*, and that government power must not be exercised in an Amend. XIV. The equal protection clause guarantees

the right of all persons to be treated by the same rules under similar circumstances, and it applies to the exercise of all powers of the State which can substantially affect the individual or his property. Thus, administrative agencies must act fairly and evenly in the promulgation and enforcement of its rules and regulations, and the courts may upset the decision of an administrative agency when that decision is demonstrably arbitrary. *F.T.C.* v. *Crowther,* 431 F. 2d 510, (D. C. Cir. 1970), *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F. 2d 859 (D. C. Cir. 1970).

In the instant matter, the Commissioner has debarred the Petitioner from bidding on and supplying material to any State-funded project, whether it be on a local or state level. As noted above, it was discovered by petitioner's counsel subsequent to the hearing in the New Jersey Superior Court, Appellate Division, that D.O.T. was not dealing even-handedly with pre-qualified contractors. In support of a motion for rehearing, counsel supplied the Appellate Division with an affidavit, setting forth in detail the continuing contractual relationship between Frederic R. Harris, Inc. and the State of New Jersey, despite a Federal indictment returned against that corporation, its officers and agents on April 19, 1972, which indictment contained 98 pages detailing and setting forth the proscribed conduct of the defendants. Despite the State's awareness of the indictment and the alleged involvement of Frederic R. Harris, Inc., substantial contracts were formed between D.O.T. and the Harris firm. See affidavit of Justin P. Walder, Esq., attorney for the petitioner, reproduced herein as Exhibit H.

Also, it was learned that on June 27, 1972 a Federal indictment named, *inter alia,* a Michael J. Manzo as a defendant charged with attempting to influence D.O.T. in the awarding of a contract. During the period of his

pending indictment and subsequent to his conviction, Manzo Contracting Company, Inc., continued to contract work involving State-funded projects. (See letter of Justice P. Walder, Esq., appended hereto as Appendix I)

In the face of the uncontroverted facts set forth in the above cited affidavit and letter, it is incongruous that D.O.T. has made its determination to debar petitioner solely on the basis that one of its principal officers lacked the moral integrity required for bidding on State contracts. The aforementioned affidavit also cites with particularity the reliance of the State in its two prior determinations and in the briefs filed in the proceedings throughout the case history of this matter that it would do business only with those who established to the State's satisfaction their qualifications, responsibility and integrity. It would seem from the foregoing situation regarding Frederic R. Harris, Inc. and Michael J. Manzo that such a policy does not in fact exist, or if it does, that it is being arbitrarily and capriciously enforced, without uniform minimum fairness to all. Thus, discrimination has denied petitioner the means of existence, in contravention of the equal protection and due process clauses of the Fourteenth Amendment.

As previously stated, the Petitioner sought in the alternative on his motion for rehearing and stay of judgment before the New Jersey Superior Court, Appellate Division, an opportunity to establish an evidential record if that court deemed it inappropriate to rule on the question of equal protection without such a record. The motion was denied and the denial was affirmed by the Supreme Court of New Jersey. It is the Petitioner's position, of course, that the Commissioner's arbitrary debarment in the absence of any specific standards, and in light of the State's contrary treatment of other convicted

and admitted violator's of New Jersey's criminal laws, justifies a reversal. In the alternative, Petitioner seeks herein an evidential hearing to substantiate factually the grounds of its equal protection argument.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the New Jerey Supreme Court's opinion of May 7, 1973.

Respectfully submitted,

SCHAPIRA, STEIN & WALDER,
Attorney's for Petitioner.

JUSTIN P. WALDER,
Of Counsel to Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

nion of Supreme Court of New Jersey (May 7, 1973)

SUPREME COURT OF NEW JERSEY

A-78/79 SEPTEMBER TERM 1972

AP ROCK INDUSTRIES, INC., STA-SEAL; M. J. STAVOLA MANUFACTURING; M. J. STAVOLA INDUSTRIES, INC.,

Appellants-Respondents,

v.

JOHN C. KOHL, New Jersey Commissioner of Transportation,

Respondent-Appellant.

Argued January 23, 1973—Decided May 7, 1973.

On certification to the Superior Court, Appellate Division whose opinion is reported at 120 N. J. Super. 8 (1972).

Mr. Alfred L. Nardelli, Deputy Attorney General, argued the cause for respondent-appellant Kohl (*Mr. Stephen Skillman,* Assistant Attorney General, of counsel; *Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney).

Appendix A

Mr. Justin P. Walder argued the cause for appellants-respondents Trap Rock Industries, Inc. *et al.* (*Mr. Jeffrey Barton Cahn,* on the brief; *Messrs. Schapira, Steiner and Walder,* attorneys).

Mr. Theodore W. Geiser argued the cause for *amicus curiae* New Jersey Heavy, Highway and Construction Industry Advancement Fund (*Messrs. Hughes, McElroy, Connell, Foley and Geiser,* attorneys).

PER CURIAM.

In *Trap Rock Industries, Inc.* v. *Kohl,* 59 N. J. 471 (1971), *cert.* denied, 405 U. S. 1065, 31 L. ed. 2d 796 (1972), we sustained the action of the Commissioner of Transportation (herein Commissioner) in temporarily suspending Trap Rock Industries, Inc. (herein Trap Rock) from bidding on contracts to be awarded by the Department of Transportation, a principal department of the executive branch of the State government. The suspension followed upon the indictment of Michael J. Stavola, who owns 80% of Trap Rock and is the president and chairman of its Board of Directors. Later Stavola was convicted of bribery and of obstructing justice and was sentenced to a jail term of one to two years. Thereupon proceedings were brought before the Commissioner for the debarment of Stavola, Trap Rock, and three other corporations wholly owned by Stavola. After hearing, an order was entered debarring those respondents for a period of five years from bidding for any contract with the Department of Transportation or with any county or municipality which utilizes or proposes to utilize State funds. The order barred those respondents from subcontracting on any such contracts or from fur-

nishing materials with respect to them. The Appellate Division affirmed the order except insofar as it debarred Stavola and his companies from bidding on county and municipal contracts. 120 N. J. Super. 8 (1972). We granted cross-petitions for certification. 62 N. J. 81 (1972).

Stavola and his companies complain because the order bars them from participating as materialmen. They say they do not seek to bid on projects of the Department of Transportation but are critically interested in supplying trap rock and related products for such jobs. Although the question whether a debarment order could preclude participation as a subcontractor or as a materialman was not involved in the first appeal before us, the thesis of our opinion in that matter applies as well if the debarred party seeks either of those subordinate roles. The Appellate Division correctly so held. It is no answer to say the general contractor would remain responsible for the total performance. The threat resides in misbehavior that will be undetected, and the risk of that harm and the need for integrity to insure against it are no less evident when a subcontractor or materialman is morally irresponsible.

It is urged that since the statute does not provide for prequalification of those who furnish materials to a job, it follows that a supplier of materials may not be debarred. That conclusion does not follow. Undoubtedly the Legislature did not provide for prequalification of suppliers because it would be impractical to pass upon the responsibility of all who might seek that role. But it remains for the Commissioner to protect the State's interest in the moral integrity of its suppliers by taking

appropriate measures to that end, and one such measure is to bar a supplier of materials when the Commissioner learns good reason exists for that action. We note that the Department of Transportation provides in its standard specifications for road and bridge construction that after the execution of the contract, the contractor shall notify the State Engineer promptly of the sources of materials the contractor intends to use.

Stavola and his companies say their debarment as materialmen is fortuitous in that, if Trap Rock had not been prequalified to bid, they would not have been the target of these proceedings. The premise is an assumption that the Commissioner is concerned with moral responsibility in a supplier of materials only if a lack of responsibility is revealed in connection with an effort to be a prime contractor. But we cannot assume the Commissioner would be indifferent to the moral responsibility of those who furnish labor or materials through the general contractor. The Commissioner assures us he will act whenever he has reason to believe that action is warranted. It may be more difficult to ferret out all dishonest suppliers, but the Commissioner cannot on that account ignore what he learns about those who do seek to do business directly with the State.

The New Jersey Heavy, Highway and Construction Industry Advancement Fund, appearing as *amicus curiae,* stresses the need for information as to what suppliers are barred and the full reach of the debarment when materials generated or handled by the suppliers are processed in one way or another by others who are not debarred. Again we must assume that the Commissioner, familiar as he is with the practical aspects of contracting with

the State, will make the necessary information available so that prospective bidders and the Stavola companies, too, will know what materials are within and beyond the bar.

We note that Stavola and his companies sought by a petition for rehearing in the Appellate Division to introduce an equal protection issue. The petition for rehearing alleged the Commissioner had not debarred another company which allegedly paid bribes to a public official. That alleged offender is not a party to these proceedings. The Appellate Division properly declined to accept the issue. To begin with, an equal protection issue is not generated merely by an assertion that someone else was dealt with differently. This must be so unless laws and duties of office can be annulled by a single error in their execution. We, of course, do not assume that the Commissioner was remiss as to that other alleged offender. We do not have the facts. All we have is a naked allegation that there are no relevant differences, with no charge that the Commissioner intended an invidious discrimination. In any event, it is inappropriate to advance the constitutional issue by a petition for rehearing on appeal and in a proceeding to which the other alleged offender is not a party.

We see no substance in the additional points stressed by Stavola and his companies.

The Commissioner appeals from so much of the Appellate Division's judgment as sets aside the debarment with respect to county and municipal contracts. The Appellate Division said it could find no source of power for the Commissioner so to order. The Commissioner's order is limited to contracts with a county or municipality with respect to which State funds are provided for all or a

part of the costs of the projects. See N.J.S.A. 27:14-1, *et seq.;* N.J.S.A. 27:15-1, *et seq.,* and N.J.S.A. 27:13A-1, *et seq.* It is true that such contracts are awarded by local government and that generally local government passes upon the qualifications of its bidders (see Local Public Contracts Law, L. 1971, c. 198, N.J.S.A. 40A:11-1, *et seq.*), but it would be incongruous to deny the Commissioner in this setting the same power and responsibility which are his to protect State funds when he is the contracting authority. The interest of the State in the moral integrity of the contractor is the same in both situations, and the Commissioner is the appropriate one to protect that State interest. The general statutory theme is that the Commissioner shall prescribe the standards and exercise supervision and control of State-aided work, see N.J.S.A. 27:13-1; 27:13-15; 27:13A-9; 27:15-1.3; 27:15-1.14E; and 27:14-13, and although none of those provisions speaks explicitly of the subject of moral responsibility, nonetheless, as we have said, there is an intimate connection between moral integrity and the tangible end-product. Reasonably implicit is the power and obligation of the Commissioner to concern himself with that essential attribute of local public work when State funds are involved.

The judgment of the Appellate Division is reversed in that respect, and the order of the Commissioner is affirmed.

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division (July 5, 1972)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1805-71

TRAP ROCK INDUSTRIES, INC., STA-SEAL; M. J. STAVOLA MANUFACTURING; M. J. STAVOLA INDUSTRIES, INC.,

Appellants,

v.

JOHN C. KOHL, NEW JERSEY COMMISSIONER OF TRANSPORTATION,

Respondent.

Argued May 1, 1972—Decided July 5, 1972

Before Judges Conford, Matthews and Fritz.

On appeal from a final order of the New Jersey Commissioner of Transportation.

Mr. Justin P. Walder argued the cause for appellants (*Messrs. Schapira, Steiner & Walder,* attorneys; *Mr. Jeffrey Barton Cahn,* on the brief).

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Mr. Alfred L, Nardelli, Deputy Attorney General, argued the cause for respondent (*Mr. George F. Kugler, Jr.,* Attorney General, attorney; *Mr. Stephen Skillman,* Deputy Attorney General, of counsel.

Messrs. Hughes, McElroy, Connell, Foley & Geiser submitted *amicus curiae* brief for New Jersey Heavy, Highway and Construction Industry Advancement Fund (*Mr. Theodore W. Geiser,* of counsel and on the brief).

PER CURIAM

Appellants appeal from a final determination and order entered by the Commissioner of Transportation on March 16, 1972. The order debarred appellants from performing any work for the Department of Transportation for a period of five years and from various activity with respect to certain county and municipal projects.

The relevant factual and legal background for this appeal is found in the opinion, *Trap Rock Industries, Inc.* v. *Kohl,* 59 N. J. 471 (1971), cert. den. —— U. S. —— (April 17, 1972), holding that the Commissioner of Transportation could bar a corporation owned and controlled by one indicated for bribery from contracting with the State.

On November 22, 1971 Michael J. Stavola (Stavola) the subject of the Trap Rock case, above, was found guilty of bribery and obstructing justice after a jury trial, and on January 21, 1972 he was sentenced to a prison term of not less than one nor more than two years.

Following sentencing the Commissioner of Transportation (Commissioner) conducted a hearing "to gather information regarding the State's ongoing business relations

with Michael J. Stavola and any business entity with which he is associated." The hearing was held on February 15, 1972.

Testimony adduced at the hearing confirmed the fact of Stavola's conviction and sentencing. It further established that Stavola was the sole owner of Sta-Seal, M. J. Stavola Manufacturing, and M. J. Stavola Industries, Inc. It was also disclosed that Stavola owns 80% of the capital stock of Trap Rock Industries, Inc., and that he is that corporation's president and chief executive officer. Testimony adduced on behalf of Stavola tended to establish that he had very little if anything to do with the day to day operation of the corporation mentioned.

After the hearing the Commissioner made certain findings and reached certain conclusions which led to the debarment order. Among the findings made was that Stavola is without the requisite moral integrity to be a responsible bidder on State contracts; that since Stavola was the principal owner of all of the corporations, and since a corporation has no moral character of its own, the corporations are also regarded to be without the requisite moral integrity to deal with the State. Finally, the Commissioner concluded that there is no logical difference between a situation where one is a direct contractor and one where he is a material supplier to the State.

On March 16, 1972 the Commissioner entered an order debarring Michael J. Stavola and the named appellants "from bidding on any contract with the Department of Transportation or any contract with county or municipal bodies which utilize or propose to utilize State funds, subcontracting on such contracts, or providing materials for such contracts, for a period of five years to run from May 7, 1971, * * *."

Appendix B

Appellants have raised several arguments on this appeal which they contend require us to reverse and vacate the Commissioner's determination and order, with respect to debarment from Department of Transportation contracts. In our view, it is unnecessary for us to review the arguments advanced since we believe that all of them have been answered directly or by clear implication adversely to appellant, by the opinion of the Supreme Court in *Trap Rock Industries, Inc.* v. *Kohl*, above. In addition, we find ample support for that portion of the debarment order which bars Stavola or the appellants from supplying materials to contractors performing State contracts under the provisions of Title 27 of the Revised Statutes and the regulations promulgated by the Commissioner pursuant thereto. In short, the Commissioner unquestionably has the power to approve the source of materials that are to be used by a contractor in the performance of State work. The withholding of approval of a source of supply by the Commissioner because of the lack of moral integrity on the part of the proposed supplier is within the rationale of the Supreme Court opinion in *Trap Rock Industries, Inc.* v. *Kohl*, above.

We fail however to find a source of power in the Commissioner to prevent Stavola or the appellants from participating in municipal or county work, whether by contracting, subcontracting or supplying materials. There is no such authority to be found within the provisions of Title 27 or the regulations promulgated by the Commissioner pursuant to that title. The scope of the opinion in *Trap Rock Industries, Inc.* v. *Kohl*, above, does not extend to this question.

The determination and order of the Commissioner of Transportation is reversed insofar as it debars appellants from participating in municipal and county work. Except to that extent the determination and order of the Commissioner is affirmed.

APPENDIX C

Determination of New Jersey Commissioner of Transportation (March 16, 1972)

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF

MICHAEL J. STAVOLA; TRAP ROCK INDUSTRIES, INC.; STA-SEAL; M. J. STAVOLA MANUFACTURING; M. J. STAVOLA, INC.

This matter has come before the Department of Transportation pursuant to N.J.S.A. 27:7-35.1 *et seq*, the general powers of the Commissioner of Transportation under Title 27, and the New Jersey Supreme Court decision in *Trap Rock Industries, Inc.* v. *Kohl*, 59 N. J. 471 (1971).

Trap Rock Industries, Inc., is a prime contractor and materials supplier who was prequalified to bid on highway construction projects. Certain facts came to my attention regarding Michael J. Stavola which, after a hearing thereon and findings of fact and conclusions of law, I determined affected the responsibility to bid of Trap Rock Industries, Inc. Therefore, by a determination dated May 7, 1971, Michael J. Stavola and Trap Rock Industries, Inc., were suspended from bidding until the indictment then pending was explained so as to satisfy the Department that Michael J. Stavola and Trap Rock Industries, Inc., possess the moral integrity to qualify

as bidders. This suspension was upheld by the New Jersey Supreme Court in *Trap Rock Industries, Inc.* v. *Kohl,* 59 N. J. 471 (1971).

Subsequent to these developments, on November 22, 1971, a jury of the County of Monmouth found Michael J. Stavola guilty on counts 3 and 4 of State Grand Jury Indictment 5-71-3. The convictions represent a finding that Michael J. Stavola bribed a State official and obstructed justice. Stavola was sentenced on January 21, 1972 to a term of not less than one year nor more than two years. These developments necessitated that a hearing be held to gather information relative to the State's ongoing business relations with Michael J. Stavola and any business entity with which he is associated. Such a hearing was held on February 15, 1972, at the Department of Transportation, 1035 Parkway Avenue, Trenton, New Jersey. The information received at this hearing is that:

1. Michael J. Stavola was charged by State Grand Jury Indictment 5-71-3 with four separate counts of improper conduct. On count one, charging conspiracy, the jury verdict was not unanimous and was recorded as a disagreement; count two charged inducing misconduct in office, attempting to so induce, aiding and abetting said inducement, whereupon the jury could not agree and their verdict was so recorded; on both the third and fourth counts charging bribery and aiding and abetting same, as well as obstructing justice and aiding and abetting same respectively, the jury returned a guilty verdict. T-8, 9; Ex. 5-3.

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2. This hearing was conducted for the purpose of receiving and developing information regarding each and every business concern with which Michael J. Stavola is connected. The scope of the hearing therefore encompassed those businesses who are prequalified to bid, or otherwise may bid upon public works contracts, or are suppliers of labor or materials (T-6, 7, 10, 28, 34), subcontractors or in any other manner prosecute a public works contract.

3. Trap Rock Industries, Inc., was prequalified to bid upon State contracts pursuant to N.J.S.A. 27:7-35.1 *et seq,* but their qualification lapsed on January 31, 1972, and they are no longer so prequalified. However, Trap Rock is a supplier of materials and by other means prosecutes the completion of public works contracts.

   Michael J. Stavola holds approximately 80% of the stock of Trap Rock. He is also the president and chief executive officer of the corporation.

4. The corporation Sta-Seal is not prequalified to bid on any State contracts. However, they are engaged in the manufacture of black top and the leasing of construction equipment (T-25). These assets are currently employed in the operations of Trap Rock (T-87), and thus the corporation has the ability to participate in public construction contracts either as a prime contractor, subcontractor, materialman or in any other manner.

   Michael J. Stavola owns 100% of the stock of Sta-Seal.

5. M. J. Stavola Manufacturing is not prequalified to bid with any State agency. The corporation is engaged in the manufacture of road emulsions for resale for use in the construction trade. Thus, this corporation has the capability to participate in public construction contracts as either a prime contractor, subcontractor, materialman, or in any other manner.

   Michael J. Stavola owns 100% of the stock of M. J. Stavola Manufacturing.

6. M. J. Stavola Industries, Inc., is also involved in highway construction as a direct contractor with municipal and other political subdivisions of the State. The corporation is engaged in the supply of road oiling materials and has the capability of becoming prequalified to bid with a State agency or serve as a subcontractor, materialman, or in some other manner participate in public construction contracts.

   This corporation's stock is owned 100% by Michael J. Stavola.

The only substantial testimony presented in defense at the hearing may be summarized as follows:

1. Michael J. Stavola has divested himself of several of the corporations which had been listed in the notice of the hearing. Also, that some of the corporations so listed are no longer in existence or doing business. These corporations (Middletown Equipment Company, Inc., M. J. Stavola Industries, Inc., Rocky Hill Explosives Co., Inc., Jesse A. How-

land & Sons, Inc., Scientific Conversion Products, Inc., Stavola Road Materials and South State, Inc.) will be dealt with in a supplemental determination and order.

2. Michael J. Stavola has very little, if anything, to do with the day-to-day operation of those corporations which admittedly are either completely or substantially owned by him.

3. The crime of which Stavola was convicted was not directly related to the performance of any public work.

After reviewing the transcript of the hearing and examining the documents submitted pursuant thereto, I find as follows:

1. The convictions of Michael J. Stavola for bribery and obstructing justice, crimes so inexorably entwined with the faith to be reposed in a contracting party, establish that Stavola is without the requisite moral integrity to be a responsible bidder on state contracts. *Mal-Bros. Contracting Co.* v. *Kohl,* 113 N. J. Super. 144 (App. Div. 1971), certif. den. 58 N. J. 94 (1971). As recently held by the Supreme Court of New Jersey:

> "That the charges do not relate to the performance of a government contract is of no moment; it could not be supposed that a man who would bribe law enforcement officers would bribe no one else." *Trap Rock Industries, Inc.,* v. *Kohl, supra* at 482.

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2. Those corporations which Michael J. Stavola controls are affected by his lack of moral integrity. the corporate entity is often held accountable for the misbehavior of those who control it. *Campbell Painting Corp.* v. *Reid* 20 N.Y. 2d 370, 283 N.Y.S. 2d 31, 229 N.E. 2d 602 (Ct. App. 1967), aff'd 392 U.S. 286 (1968). The New Jersey Supreme Court has recognized that it does not "matter that the indictment runs against Stavola individually and not the corporate entity." *Trap Rock Industries, Inc.* v. *Kohl, supra* at 482. There is no corporate veil shielding the entity from the individual for:

> "a corporation, as such, has no moral character The moral responsibility of a corporation is one and the same with the moral responsibility of the individuals who give it direction." *Ibid.*

3. Given the extent of Stavola's stock ownership in Trap Rock Industries, Inc. (80%), Sta-Seal (100%), M. J. Stavola Manufacturing (100%) and M. J. Stavola Industries, Inc. (100%), I find that it is irrelevant whether he is actively engaged in the day-to-day operations of the corporations. The fact is that Stavola has complete control over the corporations by virtue of the extent of his stock ownership. *Trap Rock Industries, Inc.*, v. *Kohl, Ibid.*

4. Due to Michael J. Stavola's lack of moral integrity, I find that those corporations in which he has a substantial interest do not possess the requisite moral responsibility to bid on contracts with the Department of Transportation. *Trap Rock Industries, Inc.* v. *Kohl, supra.*

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5. I perceive no distinction between the various possible roles a particular corporation might take in its business relationships with the State. For example, there is logically no difference between the situation where one is a direct contractor or merely a materials supplier. The reason for debarring a contractor lacking moral integrity is that the nature of the construction process is such that there is ample opportunity to bribe inspectors or to substitute inferior materials when the inspectors are not looking. I find that such potential harm exists whether the contractor lacking moral integrity is contracting directly with the State or is supplying materials to a contractor dealing with the State. In either case, the overriding concern is that in the expenditure of funds from the public treasury there must be the utmost care in choosing the business partners of the State and of the contractors doing work for the State. *Trap Rock Industries, Inc.*, v. *Kohl, supra.* Although I conclude that Michael J. Stavola and his corporations lack the requisite moral responsibility to be a materials supplier to anyone contracting with the Department of Transportation, this does not preclude contractors presently utilizing any of Stavola's companies for materials on *existing* contracts with the Department, from continuing to do so.

DETERMINATION AND ORDER

For all the foregoing reasons, the Commissioner of Transportation hereby debars, from bidding on any contract with the Department of Transportation or any contract with county or municipal bodies which utilize or

propose to utilize State funds, subcontracting on such contracts, or providing materials for such contracts, for a period of five years to run from May 7, 1971, the following corporations: Trap Rock Industries, Inc., Sta-Seal, M. J. Stavola Manufacturing and M. J. Stavola Industries, Inc. An Order is herewith entered so debarring each of the above corporations and Michael J. Stavola individually. This Order is without prejudice to the right of the above corporations to apply for reinstatement if Michael J. Stavola divests himself of all interest in said corporations or if the conviction of Stavola is reversed on appeal.

John C. Kohl
Commissioner of Transportation

Dated: March 16, 1972

APPENDIX D

Determination of New Jersey Commissioner of Transportation (May 7, 1971)

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION
1035 Parkway Avenue
Trenton, N. J. 08625

JOHN C. KOHL
Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF

MICHAEL J. STAVOLA/TRAP ROCK INDUSTRIES, INC.

HEARING ON QUALIFICATION CLASSIFICATION
DETERMINATION OF THE COMMISSIONER

This matter has been brought before the Department of Transportation under N.J.S.A. 27:7-35.8 and the general powers of the Commissioner under Title 27.

Trap Rock Industries, Inc. is a contractor who has been pre-qualified with the Department of Transportation since 1971.

Subsequent to the classification of the above contractor, information regarding developments in an investi-

gation of Michael J. Stavola, the principal officer and controlling stockholder of Trap Rock Industries, Inc., being conducted by the Attorney General of New Jersey, Division of Criminal Justice, was received by this Department which was deemed to be of such a nature as to affect the responsibility of Michael J. Stavola/Trap Rock Industries, Inc. The information received was:

1. An indictment has been returned by the State Grand Jury against Michael J. Stavola in four counts, alleging bribery of a State officer. N.J.S. 2A:85-1; N.J.S. 2A:84-14; N.J.S. 2A:98-1; N.J.S. 2A:98-2 Rather than set forth the indictment, a copy of same is attached hereto and made part hereof as Exhibit A, annexed. Based on this information, the Department of Transportation determined that this development could affect the contractor's responsibility as a bidder. Accordingly, the contractor was notified, through its attorney, that a hearing regarding the affect of this development on its bid qualification classification, would be held on April 22, 1971, postponed to May 6, 1971.

A hearing before the Department, the Honorable John C. Kohl, Commissioner, presiding, was held on May 6, 1971. At this hearing, the contractor was provided the opportunity to present any information which might have tended to substantiate its existing classification. At this hearing, a copy of the State Grand Jury indictment was introduced. The contractor's response was to categorically deny the allegation contained in the indictment by presentation of his plea of Not Guilty to all charges, including the overt acts specified in the indictment. The contractor was requested to respond to the indictment or in the alternative answer questions pertaining thereto.

Through counsel, he refused to do so, relying on his Not Guilty plea to the indictment. Contractor was asked, through its counsel, to consent to a release and examination of the Grand Jury records in an attempt to adduce a further detailed explanation concerning the allegation in the indictment. It is recognized that Mr. Stavola did not appear before the Grand Jury and had no opportunity to rebut the witnesses presented before the Grand Jury. The opportunity to do this has been afforded him at the hearing before the Department. He refused, however, to do this. Prior to this proceeding, this Department, through its counsel, had sought to secure the Grand Jury records. In the face of argument by Mr. Stavola's counsel that it would prejudice his client perhaps in a criminal case, the Department withdrew its attempt to secure the Grand Jury records through court proceedings. It was explained that securing the Grand Jury records would merely have afforded a more detailed explanation concerning the allegations in the indictment and would have given the contractor an opportunity he did not have before the Grand Jury to rebut same. Nevertheless, contractor refused to do so. It was stipulated that Mr. Stavola is indeed the controlling stockholder of the contract corporation, owning 87% of the stock in said company. He is also Chairman of the Board of Directors and President of the company, which by the company's bylaws, makes him the controlling principal officer of the company. It was further stipulated that the contractor could have and would have, if allowed, produced affidavits for testimony from various individuals as to the moral and ethical character of Mr. Stavola. Counsel for the contractor objected to the original notice sent to the contractor as not being in compliance with the Administrative Proce-

dures Act of 1968. That original notice was sent to the contractor on March 29, 1971. Due notice was afforded, through the attorney for the contractor, as to the specific basis upon which the hearing would be heard and indeed reference to the specific precedent upon which this Department replied in temporarily suspending the contractor pending hearing was presented in a petition served upon contractor in connection with the attempt to obtain the Grand Jury minutes on April 22, 1971.

Therefore, I find as follows: The facts alleged in the indictment against Michael J. Stavola, Criminal Indictment No. 1194-69, and SGJ 5-71-3, Superior Court of New Jersey, Law Division-Criminal, have not been satisfactorily explained or the actions of the principal of Trap Rock Industries, Inc., Michael J. Stavola, who is involved therein justified. Michael J. Stavola is the controlling stockholder and controlling officer of the company by virtue of his holding 80% of the stock and being President and Chairman of the Board of the company. Under these circumstances and in the context of this matter, his corporate "veil" is no defense. Michael J. Stavola is Trap Rock Industries, Inc. *Brownell* v. *Shearing*, 129 F. Supp. 879, affm'd. 228 Fed. 2d 624 cert. denied 351 U. S. 954 (1956). *Hill Dredging Corp.* v. *Risley*, 18 N. J. 501, 114 Atlantic 2d 697 (1955). *Pomeroy* v. *Simon*, 17 N. J. 59, 110 Atlantic 2d 19 (1954). The corporation is obviously required to act in all business matters in accordance with the will of this particular shareholder and officer. *Brownell* v. *Shearing*, 129 F. Supp. 879 affm'd. 228 Fed. 2d 624 cert. denied 351 U. S. 954 (1956).

It has long been the law of this State that the moral integrity and moral worth of the bidder is critical to an evaluation of his qualification to bid. *Arthur Venneri Co.*

v. *Paterson Housing Authority,* 29 N. J. 392, 403 (1959). In that case, *Venneri* had been placed on a disqualification list by the Public Housing Administration for giving a gratuity to a government contracting officer in the hope of securing favorable treatment. The New Jersey Supreme Court upheld the rejection by the Paterson Housing Authority of a low bid by *Venneri* because of the Federal disqualification. At page 403, the court noted that "[a]lthough responsibility may involve experience, financial ability and facilities necessary to perform the contract . . . it may also involve moral integrity of the bidder." Other jurisdictions have also applied this rule. *Koich* v. *Cvar,* 111 Mont. 463, 110 P. 2d 964 (1941); *Williams* v. *City of Topeka,* 85 Kans. 857, 118 Pac., 864 (1911); *Kayfield Construction Corp.* v. *Morris,* 15 A. D. 2d 373, 225 N. Y. S. 2d 507 (App. Div. 1962); *Dairymen's League Cooperative Association, Inc.* v. *Perrini,* 54 Misc. 2d 400, 282 N. Y. S. 2d 887 (Sup. Ct. 1967); *Application of Limitone,* 21 Misc. 2d 376, 189 N. J. S. 2d 738 (Sup. Ct. 1959); *Picone* v. *City of New York,* 176 Misc. 967, 29 N. Y. S. 2d 539 (Sup. Ct. 1941). Indeed this Department knows of no cases which do not follow the rule as set forth by the New Jersey Supreme Court in *Venneri, supra.*

Dairymen's League Cooperative Association, Inc. v. *Perrini, supra,* is particularly apposite to the fact situation under consideration. There, the petitioner was the low bidder for a New York City milk delivery contract, and sought to annul a determination of the Board of Responsibility that it was not a responsible bidder. Employees of the petitioner had refused to sign a waiver of immunity before the Grand Jury concerning investigations involving the milk industry. The Board of Responsibility accorded to petitioner an opportunity to answer

questions as to whether its bid was tainted by collusion, but the petitioner chose to submit as a witness an employee who refused to answer pertinent questions, resting on his constitutional privilege. The Court upheld the Board's determination that the petitioner was not a responsible bidder.

It should be noted that here as in *Dairymen's League Cooperative Association, Inc., supra,* the bidder has not been convicted of a criminal offense. In such a case, temporary suspension pending resolution of the issues left unanswered is deemed to be the proper method of disposition by this Department.

This principle of law was clarified and upheld in a recent decision of the Appellate Division dated January 18, 1971, upholding the action of the Commissioner of Transportation in suspending Mal-Bros. Contracting Company for similar reasons to those adduced in this matter.

Where an indictment has been found it is appropriate to consider the fact of the indictment itself although a finding of guilt has not yet been reached in the criminal proceeding. An indictment is a written accusation of the crime drawn by the County or Federal Prosecutor and submitted to the Grand Jury and found and presented by the Grand Jury as a true bill. 42 C.J.S. 835 *Indictments and Information,* Section 7. Although an indictment is said to be an accusation of the charges brought against an accused, it is also said to be something "more than a mere accusation based on probable cause; it is an accusation based on legal testimony * * *." 42 C.J.S. at 836. Despite the usual presumption of innocence accorded to an accused the indictment need not and should not be disregarded in the circumstances presented here. In malicious prosecution cases the fact that an indictment has

been brought by a Grand Jury (or that an accused has been held over by a Magistrate), in legal effect is evidence of probable cause, that is to say, of reasonable grounds for believing that a party is guilty of the offense. *Galofaro* v. *Kuenstler*, 52 N. J. Super. 379, 384-385 (App. Div. 1958); *Prosser on Torts* (2d Ed. 1955) Malicious Prosecution, p. 657, Section 98.

Our courts have upheld administrative action based solely upon the return of indictments of filing of charges against individuals. *Russo* v. *Walsh*, 18 N. J. 205 (Sup. Ct. 1955); *DeMarco* v. *Board of Chosen Freeholders of Bergen County*, 21 N. J. 136 (Sup. Ct. 1956). In the *Russo* case, the Supreme Court considered the propriety of temporarily suspending from employment a State employee pending the outcome of charges for malfeasance in office. In discussing the relation of a temporary suspension to the question of guilt or innocence of the accused the Supreme Court said, 18 N. J. at 212:

> "A temporary suspension such as was ordered here does not, as appellant argues, constitute a premature adjudication of guilt any more than does the indictment of an accused under our criminal law. The question of his guilt or innocence is to be determined only after he has been accorded a full public hearing at which he will have an opportunity to be heard in his own defense. *Even in the criminal field, despite the presumption of innocence, our courts have the power to deprive persons under indictment for certain types of offenses of their liberty.* See R.R. 3:9-1 (a)(d). The power exists because experience has shown it is in furtherance of the general public good, although it undoubtedly infringes to a marked degree upon the personal liberty of the one involved.

Appendix D

> "In the case of state employees, the public interest likewise fully justifies the existence of the power to suspend temporarily pending a hearing. It is not contended the Governor acted in bad faith in the case *sub judice*, and the record discloses the appellant's suspension was ordered only after an officer appointed by the Governor had conducted an investigation and formal charges had been filed, of which appellant was given notice simultaneously with the suspension order. The merits of the charges are, of course, not before us." (Emphasis added.)

In the *DeMarco* case, *supra*, a police officer was suspended from duty and pay pending the outcome of an indictment against him. In commenting on his suspension the court said, in 21 N. J. at 139:

> "The propriety of the Deputy Attorney General's action seems beyond question for it would have been decidedly against public interest for the plaintiff to have served as a law enforcement officer while he was under indictment."

The action taken here should not be considered as a penalty for the offense charged but as administrative action for the prospective protection of the public interest which must be safeguarded. *See*: *Vance* v. *State of New Jersey*, 67 N. J. Super. 63 (App. Div. 1961), where the court said:

> "The suspension or revocation of a driver's license is not necessarily punitive in purpose. It is a measure 'for the prospective safety and protection of the traveling public in the nature of an auxiliary remedial sanction'."

Appendix D

I have been given broad discretion under the statutes to determine who are responsible bidders. It is my obligation to exercise that discretion in a manner that applies fairly to all prospective bidders. It is also my obligation to take measures to insure that the construction program of the State will be carried out expeditiously and faithfully by the contractors with whom this Department does business. In our view doing business with the State is a privilege that should be accorded to those who establish to our satisfaction their qualifications, responsibility and integrity. In my view, an indictment reflects unfavorably upon the integrity of a contractor in connection with the bidding laws. To convict under the criminal laws it is necessary to establish the guilt of the accused beyond a reasonable doubt. But as an administrative officer, I need not judge qualification to do business with the Department by that standard of proof. *Mal-Bros. Contracting Co.*, v. *John C. Kohl, Commissioner of Transportation,* Superior Court of New Jersey, 113 N. J. Super. 144 (1971). A copy of which is attached hereto and is marked "Exhibit B".

The fact that the offense stated in the indictment concerned bribery of Government officials is particularly noteworthy. In our view, such dealings with another Government agency are as reprehensible as if such dealings were with this particular Department. This is especially so when both agencies are part of State government and are but two arms of a single branch. It is indicia of conduct by the contractor in his dealing with Government entities.

Accordingly, it is hereby ordered that Michael J. Stavola/Trap Rock Industries, Inc. be suspended from bid-

ding until satisfactory explanations for the items contained in the indictment are adduced to satisfy this Department that Michael J. Stavola/Trap Rock Industries, Inc. possess the moral integrity to qualify as a bidder.

JOHN C. KOHL
Commissioner of Transportation

Dated: May 7, 1971

APPENDIX E

Opinion of the Superior Court of New Jersey, Appellate Division (June 30, 1971)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1458-70

TRAP ROCK INDUSTRIES, INC., a New Jersey corporation,

Appellant

v.

JOHN C. KOHL, Commissioner of Transportation, and JAMES R. SCHUYLER, State Highway Engineer,

Respondents

Argued June 15, 1971—Decided June 30, 1971

Before Judges KILKENNY, HALPERN and LANE.

On appeal from the Final Determination of the Commissioner of Transportation.

Mr. Justin P. Walder argued the cause for appellant (*Messrs. Schapira, Steiner & Walder,* attorneys).

Mr. Stephen Skillman, Assistant Attorney General, argued the cause for respondent (*Mr. George F. Kugler, Jr.,* Attorney General of New Jersey, attorney; *Messrs. Alfred L. Nardelli, Roger L. Hillman*

and *Courtland T. Babcock, II,* Deputy Attorneys General, on the brief).

Mr. Adrian M. Foley argued on behalf of *amicus curiae* New Jersey Heavy, Highway and Construction Industry Advancement Fund (*Messrs. Hughes, McElroy, Connell, Foley & Geiser,* attorneys; *Mr. Theodore W. Geiser,* of counsel; *Mr. Richard D. Catenacci,* on the brief.)

The opinion of the court was delivered by KILKENNY, P.J.A.D.

On May 7, 1971 the State Commissioner of Transportation made a determination that "Michael J. Stavola/Trap Rock Industries, Inc., be suspended from bidding until satisfactory explanations for the items contained in the indictment are adduced to satisfy this Department that Michael J. Stavola/Trap Rock Industries, Inc., possess the moral integrity to qualify as a bidder."

Trap Rock Industries, Inc., prosecutes this appeal from that administrative determination. This company is a contractor and had been prequalified with the Department of Transportation prior to the above suspension.

The indictment referred to in the order of suspension, a copy of which was attached to the Commissioner's determination, charged that Michael J. Stavola and Joseph Martinelli, between October 19, 1970 and March 17, 1971, did in four-named municipalities in New Jersey, conspire in violation of N.J.S.A. 2A:98-1 and 2A:98-2 to commit three specified crimes. The purported crimes constituting the basis of the alleged conspiracy all related to efforts made by Stavola and Martinelli (1) to induce Detective James Sweeney of the New Jersey State

Appendix E

Police to intercede for Michael J. Stavola, defendant in a pending indictment for assault and battery upon a police officer, in violation of N.J.S.A. 2A:85-1 and 2A:85-14; (2) to offer a bribe to Detective Sweeney in the same matter; and (3) to obstruct justice by Sweeney's endeavours to obtain a favorable disposition of the police officer assault and battery indictment.

The second count of the indictment charged the same defendants, in relation to the same matter, with violations of N.J.S.A. 2A:85-1, 2A:85-5 and 2A:85-14. The third count charged attempted bribery of Detective Sweeney for the same purpose, in violation of N.J.S.A. 2A:85-1 and 2A:85-14. The fourth count charged an obstruction of justice, all in relation to the same subject matter, contrary to N.J.S.A. 2A:85-1 and 14. In brief, the four-count indictment involves the same subject matter, but charges the alleged offense in various aspects.

Trap Rock Industries, Inc., and Michael J. Stavola, its principal officer and stockholder, were notified by the Commissioner and given an opportunity to present any additional information at a hearing which might tend to substantiate the existing classification of being a "responsible" bidder. Stavola denied the charges set forth in the indictment but declined to elaborate thereon.

At the hearing no proof was received by the Commissioner as to the truth of the recitals in the indictment. The minutes of the grand jury were not disclosed to or examined by the Commissioner.

In brief, disqualification from bidding has been visited by the Commissioner upon this corporate public contractor solely on the basis of the indictment itself against its principal officer and 80% stockholder and Stavola's

failure to explain satisfactorily and justify the unproven recitals in the indictment. There is no question as to the competency of Trap Rock Industries, Inc., to perform any public contract which might be awarded to it. The company has the equipment, the experience, the supervisory and other personnel, financial stability and ability to post any required performance bond, all as demonstrated by a previous determination of qualification.

The reason for suspending the right to bid and enter into a contract with the State for public work is the Commissioner's determination that the indictment, not satisfactorily explained away at an administrative hearing, is sufficient evidence of a lack of "moral integrity" to deprive one of being classified as a "responsible" bidder.

We pass the issue of whether a corporate entity may be deemed lacking in moral integrity, if its principal officer and controlling stockholder, a separate legal entity, is justifiably found to be lacking in moral integrity. We shall assume in this case, as did the Commissioner, that protection of the public interest warrants a "piercing of the corporate veil."

So, too, we proceed upon the correctness of the rule laid down by us in *Mal-Bros. Contracting Co.* v. *Kohl,* 113 N. J. Super. 144, 147 (App. Div. 1971), certification denied 58 N. J. 94 (1971), that determining the meaning of "responsible," when related to a bidder for a public contract, embraces the factor of "moral integrity." But *Mal* is factually distinguishable. There, we found that "there was substantial competent and relevant evidence in the record to support the Commissioner's finding of a lack of moral integrity on the part of Mal." *Ibid.* We specified the three principal items supporting that conclusion. We

particularly noted in *Mal,* "The Commissioner's determination was not based on hearsay or other improper evidence." At 147.

In the instant case, the Commissioner's determination is based essentially, if not entirely, upon the hearsay recitals in the indictment, which in turn depend for their reliability upon grand jury testimony of a witness or witnesses whose credibility has not been tested.

The Commissioner relies upon the policy of administrative suspension of public employees upon return of indictments against them, citing *De Marco* v. *Board of Chosen Freeholders of Bergen County,* 21 N. J. 136 (Sup. Ct. 1956). The suspension of a police officer without pay pending favorable disposition of the indictment against him is distinguishable from the suspension of a contractor from bidding on public work. When cleared and reinstated, the police officer is entitled to reimbursement for his lost wages. But how is the disqualified contractor to be reimbursed when and if he is cleared? Then, too, there are the irretrievable losses suffered perhaps by his employees. It is alleged that Trap Rock Industries has from 500 to 800 employees and its average weekly payroll ranges from $110,000 to $125,000. In addition, there is the loss through lack of use of equipment.

The Commissioner recognized that an indictment is evidence only of the fact that a charge has been made; it in no wise establishes the truth of the charge or the presence of sufficient legal proof thereof. It is not uncommon for entirely innocent persons to be indicted. *State* v. *Orrecchio,* 16 N. J. 125, 132 (1954). The presumption of innocence is deeply ingrained in our law. It is worthy of recognition before a State administrative agent as it is

in a court of criminal justice. Stavola and the corporation, Trap Rock Industries, Inc., were entitled to application of that principle in the instant situation.

The determination of the Commissioner suspending Stavola/Trap Rock Industries, Inc., from the classified list of "responsible" bidders, is reversed and the Commissioner is directed to reinstate them to their former "qualified" position.

APPENDIX F

Opinion of the Supreme Court of New Jersey (November 23, 1971)

A-41

TRAP ROCK INDUSTRIES, INC., a New Jersey Corporation,

Respondent,

v.

JOHN C. KOHL, Commissioner of Transportation, and JAMES R. SCHUYLER, State Highway Engineer,

Appellants.

A-42

CARMEN OTTILIO, t/a V. OTTILIO AND SONS,

Respondent,

v.

JOHN C. KOHL, Commissioner of Transportation,

Appellant.

Argued September 27, 1971. Decided November 23, 1971.

On appeals from the Superior Court of New Jersey, Appellate Division.

Appendix F

Trap Rock Industries, Inc. v. *Kohl* reported at 115 N. J. Super. 278 (App. Div. 1971).

Mr. George F. Kugler, Jr., Attorney General of New Jersey, argued the cause for appellants (*Mr. Stephen Skillman*, Assistant Attorney General, and *Mr. David A. Biederman*, Deputy Attorney General, of counsel; *Messrs. Alfred L. Nardelli, Roger L. Hillman*, and *Courtland T. Babcock, II*, Deputy Attorneys General, on the brief).

Mr. Justin P. Walder argued the cause on behalf of respondent Trap Rock Industries, Inc. (*Mr. Jeffrey Barton Cahn*, on the brief; *Messrs. Schapira, Steiner and Walder*, attorneys).

Mr. Louis Santorf argued the cause for respondent Ottilio (*Messrs. Kopp, Knoepfel and Toomey*, on the brief).

Mr. Theodore W. Geiser argued on behalf of *amicus curiae* New Jersey Heavy, Highway and Construction Industry Advancement Fund (*Mr. Richard D. Catenacci*, on the brief; *Messrs. Hughes, McElroy, Connell, Foley and Geiser*, attorneys).

The opinion of the Court was delivered by
WEINTRAUB, C. J.

The issue before us is whether the State Commissioner of Transportation (herein Commissioner) improperly "suspended" the respondents (herein contractors) from bidding on contracts to be awarded by the Department of Transportation, a principal department of the executive branch of the State government. Both contractors had been "classified" to bid. As will presently appear, a stat-

ute provides that prospective bidders shall establish their qualifications prior to bidding rather than after the bids have been received and the low bidder ascertained. In the cases before us, the suspension was based upon the fact that indictments had been returned charging criminal offenses, without proof before the Commissioner affirmatively establishing the criminal allegations. In both cases the contractors declined an opportunity to present evidence concerning the truth of the criminal charges. The Appellate Division held the suspensions were illegal because of the absence of competent evidence establishing the commission of the alleged offenses. *Trap Rock Industries, Inc.* v. *Kohl,* 115 N. J. Super. 278 (App. Div. 1971); *Ottilio* v. *Kohl* (not reported). We granted the Commissioner's petitions for certification. 59 N. J. 239 (1971).

As to respondent Trap Rock Industries (herein Trap Rock), the indictment ran against Michael J. Stavola. He owns 80% of the stock of Trap Rock and is its president and chairman of its board of directors. The indictment charged that Stavola conspired with another to bribe and offered a bribe of $5,000 to a member of the New Jersey State Police to intercede improperly on Stavola's behalf with respect to still another indictment charging Stavola with assault and battery upon a police officer and with obstructing the officer in the performance of his duties. Upon learning of the bribery indictment, the Commissioner gave notice to Trap Rock that this criminal charge would, in the Commissioner's opinion, affect the "responsibility" of Trap Rock; that Trap Rock's "classification" was thereby "suspended"; and that Trap Rock was given "an opportunity to be heard on this action" within the ensuing ten days. At the hearing the

indictment was placed in evidence. Trap Rock noted Stavola's plea of not guilty to the indictment but declined to offer any testimony as to the criminal charges. Trap Rock also declined to consent to the examination of the transcript of the grand jury testimony.

Prior to the Commissioner's action, Trap Rock had bid on a job. Subsequently it developed that Trap Rock was the low bidder for that contract. The Commissioner refused to award the contract to Trap Rock. The Appellate Division's judgment would have required the award to be made to Trap Rock. We granted a stay of an award pending the disposition of this appeal.

Respondent Carmen Ottilio is the sole owner of the business he conducts under a trade name, V. Ottilio and Sons. The indictment in his case was returned in the United States District Court for the District of New Jersey. Nine counts charged Ottilio with offering substantial bribes to a special agent of the Intelligence Division, United States Internal Revenue Service, and also with filing false income tax returns, again involving substantial sums of money. As in the case of Trap Rock, the Commissioner notified Ottilio that there were developments since his classification to bid which would affect Ottilio's responsibility and would authorize the voiding of such classification; that his classification was "suspended," and that an opportunity would be afforded him to be heard on that action. Again, as in the case of Trap Rock, the indictment was introduced into evidence and Ottilio declined to go beyond noting his plea of not guilty in the federal court. Ottilio waived any objection to the Commissioner's examination of the grand jury minutes, but, we gather, the federal authorities would not make them available.

Appendix F

The contractors contend the Commissioner's actions violate the provisions of the Administrative Procedure Act and deny due process because (1) the Commissioner did not adopt rules delineating the misdeeds which would disqualify a bidder, and (2) their classifications were suspended on the basis of an indictment alone, without independent proof of the truth of the criminal charges.

I.

These cases do not involve the right to engage in business. The contractors are free to do business with anyone willing to deal with them. The question is whether the State must do business with them despite the Commissioner's view that the public interest would be disserved by doing so. And the question is not whether the Commissioner may bar Trap Rock or Ottilio permanently upon the record in these matters, for the Commissioner went no further than temporarily to suspend their opportunity to seek the business of the Department of Transportation pending a showing that the State's interest would be served by doing business with them notwithstanding the criminal charges.

We start with the premise expressed in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127, 84 L. ed. 1108, 1114-15 (1940), that "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." The State need not resort to competitive bidding. *Cf. Lehigh Construction Co.* v. *Housing Authority of the City of Orange*, 56 N. J. 447 (1970); *Rutgers* v. *Kugler*, 110 N. J. Super. 424 (Law

Div. 1970), affirmed o.b., 58 N. J. 113 (1971). And if the Legislature chooses to direct competitive bidding, it need not mandate an award to the "lowest" responsible bidder but rather may vest in its agent the discretion to accept the bid of "that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered," as the statute provided in *Commercia Cleaning Corp.* v. *Sullivan*, 47 N. J. 539, 548 (1966).

That the State may decide how to procure its needs does not mean that, having chosen a course, the State may pursue it with the abandon of a private consumer. When the State acts, certain restraints attach. So, as frequently noted, the State could not select its suppliers on the basis of religious, racial or ethnic attributes. See *Garden State Dairies of Vineland, Inc.* v. *Sills*, 46 N. J. 349, 355 (1966), same case, 53 N. J. 71 (1968); *cf. Burlington County Evergreen Park Mental Hospital* v. *Cooper*, 56 N. J. 579, 583-584 (1970). Nonetheless the purpose of a procurement program is not to advance the interest of those who want the State's business. On the contrary, the purpose is to serve the State's interest as purchaser.

The purpose of competitive bidding statutes "is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good * * *." *Hillside Township* v. *Sternin*, 25 N. J. 317, 322 (1957).

It, of course, serves the public interest to permit suits to enforce the policy of these statutes. To that end, a taxpayer may sue. So, too, may a bidder who claims to be

entitled to the award. And to the same end, the low bidder is entitled to be heard by the public authority before his bid is rejected. *Commercial Cleaning Corp.* v. *Sullivan, supra,* 47 N. J. at 550; *Arthur Venneri Co.* v. *Paterson Housing Authority,* 29 N. J. 392, 402 (1959); *Paterson Contracting Co.* v. *Hackensack,* 99 N. J. L. 260, 261 (E. & A. 1923); *J. Turco Paving Contractor, Inc.* v. *Orange,* 89 N. J. Super. 93, 98-99 (App. Div. 1965); *Sellitto* v. *Cedar Grove,* 132 N. J. L. 29, 32 (Sup. Ct. 1944). The low bidder is sometimes said to have acquired a "status." That he has an interest of some character which will support a claim to be heard cannot be questioned. The point to be stressed is that the interest, whatever its dimensions, is conferred upon him to the end that the public will obtain all that is due it in the procurement process, rather than for his individual aggrandizement. As was said in *Arthur Venneri Co., supra,* 29 N. J. at 402-03, "The requirement of a hearing derives from the basic policy of the bidding laws, *i.e.,* the encouragement of competition, which in turn works to protect the public coffers and prevent chicanery and fraud in public office."

We noted earlier that Trap Rock and Ottilio were "prequalified" for bidding. Under some competitive bidding statutes, the bidder's qualifications are determined after bids are received and the low bidder thus ascertained. There are, however, some situations in which the Legislature has decided that the public interest would be furthered by classifying prospective bidders in advance of bidding. One such statute, N.J.S.A. 27:7-35.1-35.12, applies to the Department of Transportation and is here involved. In brief, section 35.2 requires that all persons who propose to bid on highway work "shall first be classified by the department as to the character and amount

of work on which they shall be qualified to submit bids." Section 35.3 requires a sworn statement in response to a questionnaire prepared by the department which "shall develop fully the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder, and also such other pertinent and material facts as may be deemed desirable." Section 35.6 provides that a dissatisfied applicant "may request in writing a hearing before the prequalification committee." Section 35.8 reads:

> "Nothing contained in this act shall be construed as depriving the State Highway Commissioner[1] of the right to reject a bidder at any time prior to the actual award of a contract, where there have been development subsequent to the classification of such bidder, which in the opinion of the commissioner would affect the responsibility of the bidder. Before taking final action on any such bid, the commissioner shall notify the bidder and give him an opportunity to present any additional information which might tend to substantiate the existing classification."

We find nothing in this statute to evidence a legislative departure from the basic principle that bidding statutes are intended for the benefit of the taxpayer rather than the bidder or prospective bidder. The statute simply provides, so far as feasible, for a determination of qualification before bidding rather than after the bids are in. The opportunity for hearing afforded by this statute merely parallels the right to hearing after the bids are in which

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[1] Now Commissioner of Transportation. N.J.S.A. 27:1A-5.

the more conventional bidding statutes contemplate. We find no purpose to vest in a preclassified bidder any "right" which derogates the primary right of the State through its Department of Transportation to do business, in the words of N.J.S.A. 27:7-30, with "the lowest *responsible* bidder." (Emphasis ours.)

Thus, the bidder's "rights" remain subordinate to the primary interest of the State as a consumer. We must give ultimate regard to the State's welfare. Trap Rock and Ottilio cannot be accorded any "right" which would subvert the primary objective of the statute, that the State do business with a "responsible" bidder. With this in view, we turn to the propositions they advance.

II.

It is settled that the legislative mandate that a bidder be "responsible" embraces moral integrity just as surely as it embraces a capacity to supply labor and materials. *Arthur Venneri Co.* v. *Paterson Housing Authority, supra,* 29 N. J. at 403; *Mal-Bros. Contracting Co.* v. *Kohl,* 113 N. J. Super. 144, 147 (App. Div. 1971), certif. denied, 58 N. J. 94 (1971); *Kayfield Construction Corp.* v. *Morris,* 15 A. D. 373, 225 N. Y. S. 2d 507, 514 (1st Dept. 1962); 43 *Am. Jur., Public Works and Contracts,* § 42, pp. 784-85. The relevancy of moral responsibility is evident. It heads off the risk of collusive bidding. It assures honest performance. It meets the citizen's expectation that his government will do business only with men of integrity. The question then is whether under the circumstances of these cases the Commissioner could reasonably believe it was not in the best interest of government to deal with these contractors until the criminal allegations were re-

solved in some manner. *Cf. Arthur Venneri Co., supra,* 29 N. J. at 402.

We need hardly labor the point that the charges of bribery contained in the indictments would, if established, reveal a lack of moral responsibility for doing business with the State. That the charges do not relate to the performance of a government contract is of no moment; it could not be supposed that a man who would bribe law enforcement officers would bribe no one else.

Nor, as to Trap Rock, does it matter that the indictment runs against Stavola individually and not the corporate entity. Trap Rock urges there is no basis to "pierce the corporate veil." The concept is not relevant. There is no veil to pierce. A corporation, as such, has no moral character. The moral responsibility of a corporation is one and the same with the moral responsibility of the individuals who give it direction. See *Metropolitan Motors* v. *State,* 39 N. J. Super. 208 (App. Div. 1956); *D. B. M. Amusement Corp.* v. *Thourot,* 29 N. J Super. 462 (App. Div. 1954), certif. denied ,15 N. J. 382 (1954); *George Campbell Painting Corp.* v. *Reid,* 283 N. Y. S. 2d 31, 229 N. E. 2d 602 (Ct. App. 1967), affirmed, 392 U. S. 286, 20 L. Ed. 2d 1094 (1968); *Benson Parking Corp.* v. *O'Connell,* 220 N. Y. S. 2d 1010 (Sup. Ct. 1961). And Trap Rock cannot escape identification with Stavola upon the assertion that others handle its day-to-day operations, for Stavola owns 80% of the capital stock and is president and chairman of the board of directors .

The contractors contend the Commissioner was required by statute to specify in rules the factual patterns which spell out a lack of moral responsibility. We find no such mandate. Neither N.J.S.A. 27:7-35.11 of the pre-

classification statute, which authorizes the Commissioner to establish "such reasonable regulations as he may deem appropriate for controlling the qualifications of prospective bidders," nor N.J.S.A. 52:14B-3 of the Administrative Procedure Act, which requires each agency to adopt certain rules,[2] can be read expressly to call for a definition of moral responsibility. There are good reasons not to find that requirement by implication. One is that the Legislature could hardly have intended its demand for moral responsibility to lie inert until activated by an administrative rule. Another is that since moral responsibility is common to bidding statutes, it is unlikely the Legislature wanted each agency to assay its own definition. Further the subject defies a cataloguing of all conceivable factual patterns which reveal moral deficiency Finally, no such detailed exposition is needed. Good moral character is demanded in sundry situations without

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[2] N.J.S.A. 52:14B-3 reads:

> "In addition to other rule-making requirements imposed by law, each agency shall:
>
> (1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submission or requests;
>
> (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;
>
> (3) make available for public inspection all final orders, decisions, and opinions, in accordance with the provisions of chapter 73 of the laws of 1963 as amended and supplemented (c. 47:1A-1 et seq.)"

a brochure upon the topic. The standard draws specificity from each setting. So here, the nature of the subject, *i.e.*, doing business with the State as a supplier in its procurement program, itself supplies sufficient concreteness to the concept of moral integrity. The demand is for a party who will compete honestly, and will perform honestly, and whose record does not suggest to the public a lack of that essential integrity. Hence, the standard is adequate; indeed "it is difficult to conceive of a standard which would be both more precise and equally workable." *Elizabeth Federal S. & L. Assn.* v. *Howell*, 30 N. J. 190, 194 (1959).

The contractors rely heavily upon *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D. C. Cir. 1964). There it was held that the Federal Administrative Procedure Act required the agency to spell out the misdeeds which would entail disbarment of a license to participate in certain transactions under the auspices of the Commodity Credit Corporation. There are differences which distinguish that case from ours.

Gonzalez does not clearly reveal the nature of the relationship between the Gonzalez corporation and the federal agency. The specific charge was that Gonzalez misused official inspection certificates in the resale in Brazil of surplus beans bought from the Commodity Credit Corporation. The misuse of the certificate resulted in misrepresentation of the condition of the commodity. One of the Gazalezes was indicted and pled guilty to a lesser offense which involved substantially the same factual charge. It is clear that the case did not involve a procurement program designed to meet the government's own needs as purchaser. Rather the immediate transactions

apparently related to the purchase from the government of commodities the government had acquired, as part of a composite program designed for the stabilization, support and protection of farm income and prices, the maintenance of balanced and adquate supplies of agricultural commodities, and the development of foreign markets for such commodities. 15 U.S.C.A. § 714 and 714c(f). We gather that the debarment of the Gonzalez corporation would have ended its business of reselling surplus commodities in other countries.

Thus *Gonzalez* did not involve the question whether the federal government would be compelled to procure its needs from normally unfit suppliers unless the manifold ingredients of the unfitness syndrome were anticipated in some detailed fashion. At most *Gonzalez* involved the sale of a commodity by the government and its resale elsewhere. More importantly, Gonzalez was not debarred on an allegation that he lacked relevant moral responsibility to do business with government. Rather the court there dealt with the case on the premise that debarment was based exclusively upon the doing of *a specific act,* the misuse of an inspection certificate, and hence *Gonzalez* stands for the view that if a *specific act* is itself to be sufficient grounds for debarment, the agency should prohibit the act by rule and announce that a violation could itself lead to such consequences. We do not read *Gonzalez* to mean that the moral responsibility which government demands of those who would like to supply its needs must be defined in terms of detailed acts or omissions, failing which government must accept a bidder, however lacking he may be in integrity. Indeed, *Gonzalez* found it implicit that dishonesty would justify debarment, 334 F. 2d at 576-77. It would seem incongruous

to say that although honesty is so vital that it is an implied requisite, a lack of it will not be a bar unless an administrator states in advance what acts or omissions cannot be reconciled with that trait.

We should add that if we read our statute to contemplate that the Commissioner must adopt a rule spelling out the sundry acts or omissions which could lead to a finding that moral responsibility was lacking, we could not say the Legislature intended that the Commissioner's failure to do so would require a contract to be made with someone morally unfit for the State's business. The purpose of the bidding statute being to guard the State's interest rather than to advance a bidder's, that result would defeat the very purpose of the enactment.

Defendants say that if the statute is not read to require an itemization of acts and omissions which will support a finding of a lack of moral responsibility, there is a denial of due process of law. We are satisfied that due process does not require that the State, in its role as a purchaser, must thus canalize the discretionary power of its agents to protect the public interest in this area, and indeed at the pain of being compelled to contract for its needs with a bidder who is unfit. In this setting, the requirement of moral responsibility, as spelled out in judicial decisions, is constitutionally sufficient. It denies nothing that is due one who would like to compete for the State's business. A would-be bidder could hardly say he became morally irresponsible because no one defined the term for him. Nor does the standard invite or permit the kind of invidious treatment which we mentioned above in discussing possible limitations upon the doctrine of *Perkins* v. *Lukens Steel Co., supra,* 310

U. S. 113, 84 L. ed. 1108, that government, like private individuals and businesses, "enjoys the unrestricted power * * * to determine those with whom it will deal."

III.

The contractors next contend the hearing accorded them did not comport with the Administrative Procedure Act. More precisely, they say that when they were classified for future bidding, they acquired a "license" within the meaning of N.J.S.A. 52:14B-2(f) which defines the word[3] and therefore they are protected by N.J.S.A. 52:14B-11 which provides that no agency shall revoke or refuse to renew a license unless the agency "has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases"; that the hearing here involved did not meet the demands of N.J.S.A. 52:14B-10, which deals with hearings in "contested cases"; and that an indictment, not being proof of its own allegations, cannot itself sustain a revocation.

The contractors point out that it was held in *Mal-Bros. Contracting Co.* v. *Kohl, supra,* 113 N. J. Super. at 147, that the Administrative Procedure Act applied to the debarment of a bidder by the Commissioner. We accept that proposition provided it is kept in mind in applying the statute that the so-called "license" exists to further the State's interest as a purchaser rather than to vest in the bidder some right at the expense of that public in-

[3] License, as there defined, "includes the whole or part of any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law."

terest. Expressed another way, the Administrative Procedure Act should not be read to deny to a purchasing agency the procedural latitude necessary to protect the public interest which the bidding process was intended to secure. We repeat that we are not dealing with a license to engage in a contracting business. The contractors are free to do business with anyone willing to deal with them. The claimed right here is to compel the State to do business with them.

And the question before us is not whether an indictment may support a final order debarring a bidder. Unlike *Mal-Bros., supra,* the present proceeding did not seek that final result. The purpose here was to *suspend,* pending resolution of the criminal charges.

An indictment of course is not proof of its own allegations in the criminal trial itself, see *State* v. *Orecchio,* 16 N. J. 125 (1954). In the criminal trial, the indictment is the very charge to be made out, and it would deny the accused's right of confrontation to give the indictment any evidential value whatever. But this is not to say that an indictment is nothing at all, even within the criminal process. The indictment will suffice to warrant the arrest of the accused and to hold him to or even without bail. For an indictment, far from being a mere allegation, constitutes a finding by a grand jury that a basis exists for subjecting the accused to a trial, with the intermediate restraints upon his freedom we just mentioned.

Under our practice the grand jury instructed:

> "* * * After you have heard the evidence, you are to decide whether a *prima facie* case has been made out. This means whether the State has pre-

sented evidence, which if unexplained or uncontradicted, would carry the case to a jury and justify the conviction of the accused."

Thus, with respect to Trap Rock, the indictment constitutes such a hearing as to its principal, Stavola. The federal indictment of Ottilio undoubtedly means no less. Although the term "probable cause" seems to be used in the federal courts, *Hall, Kamisar, LaFave, and Israel, Modern Criminal Procedure* (3d ed. 1969), pp. 793-794; 8 *Moore, Federal Practice* (2d ed.) § 603[2], p. 6-14; 1 *Wright, Federal Practice and Procedure* (1969) § 110, p. 198, it probably means a *"prima facie"* case rather than the less exacting "probable cause" which will justify a search, *State* v. *Burnett,* 42 N. J. 377, 386-88 (1964); *State* v. *Davis,* 50 N. J. 16, 23-24 (1967). Whatever the meaning of "probable cause" in this context, the federal indictment imports the existence of facts sufficient to subject a defendant to trial and to the intermediate deprivations already mentioned.

An indictment, State or federal, is hardly a neutral fact for all purposes. In the area of our present concern, it cannot be said that an indictment has no meaning. On the contrary, the indictment means that a basis exists to believe the charge if the evidence on hand is not explained or contradicted. And if the charge against the contractor is true, his lack of responsibility is a present fact. A conviction thereafter will merely evidence that the disqualifying attribute did exist.

The question is whether the Legislature intended the State's agency to enter into contracts with a would-be contractor in the face of a grand jury's finding that there is a *prima facie* basis for a belief that the contractor is

presently unfit for the job. We are satisfied the Legislature did not intend that course. The alternatives then are but two—a suspension pending the resolution of the criminal charge or an immediate trial by the agency itself of that charge. To require the agency to try the criminal charge would not be appropriate. The evidence might not be available to the agency, and if it were, the right to a fair trial in the criminal case might be infringed by the prior trial and decision in the administrative hearing. The remaining course is the one pursued here, of immediately suspending the bidder's classification, coupled with an opportunity to the bidder to come forward, if he can, with any showing from which the agency could find it would not disserve the public interest to contract with him notwithstanding the grand jury's finding of a *prima facie* basis for the disabling criminal charge.

We have consistently recognized an implied power in the State and its subdivisions to suspend its employees or officers pending disposition of indictments or other charges where the public interest so requires. *Russo* v. *Walsh*, 18 N. J. 205, 212 (1955); *De Marco* v. *Bergen County*, 21 N. J. 136, 139, 145 (1956); *Winne* v. *Bergen County*, 21 N. J. 311 (1956); *Romanowski* v. *Board of Education*, 89 N. J. Super. 38, 40-41 (App. Div. 1965). The same public interest should justify a refusal to engage a contractor pending resolution of a criminal charge which, if true, would disqualify. Nor does it improve the contractors' position to say the preclassification procedure described above constitutes them "licensees," for the license is no more than a license to seek contractual relations with the State.

Indeed, even with respect to licenses to engage in a business or activity, it is generally said to be implicit that

a suspension may be ordered pending investigation when the public interest so requires. *Davis, Administrative Law Treatise* (1958), § 7.08, pp. 438-444, 1970 Supp. § 7.08, pp. 331-333; *Gelhorn & Byse, Administrative Law* (4th ed. 1960), pp. 764-767; see *Bechler* v. *Parsekian,* 36 N. J. 242 (1961). The fact of an indictment for crime has been held an adequate basis for an immediate suspension, *Halsey Stuart & Co.* v. *Public Service Commission,* 212 Wis. 184, 248 N. W. 458 (1933), and for the rejection of a low bid for public work, *Zara Contracting Co.* v. *Cohen,* 23 A. D. 718, 257 N. Y. S. 2d 118 (3d Dept. 1965). In *Gonzalez* v. *Freeman, supra,* 334 F. 2d 570, upon which the contractors rely heavily in other respects, the licensee did not challenge the power of the Secretary of Agriculture to suspend the license temporarily even in advance of an indictment (pp. 573, 579). What was there under attack was a final order in a debarment proceeding.

The classification statute itself recognizes a power to reopen the subject of a contractor's qualification on the basis of new information. N.J.S.A. 27:7-35.8 provides:

> "Nothing contained in this act shall be construed as depriving the State Highway Commissioner [now Commissioner of Transportation] of the right to reject a bidder at any time prior to the actual award of a contract, where there have been developments subsequent to the classification of such bidder, which in the opinion of the commissioner would affect the responsibility of the bidder. Before taking final action on any such bid, the commissioner shall notify the bidder and give him an opportunity to present any additional information which might tend to substantiate the existing classification."

Appendix F

The Administrative Procedure Act does not negate that power. N.J.S.A. 52:14B-11 of that act reads in part:

> "• • • Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with the provisions of this act."

Thus, granted that the classification to bid conferred a "license" to do business with the State, the Administrative Procedure Act did not bar the Commissioner's temporary suspension.

For these reasons we cannot say the Commissioner acted unreasonably when he suspended the classifications for bidding on the basis of the indictments. It was appropriate, and sufficient, to offer the contractors an opportunity to explain away the criminal charges to obviate the temporary suspension. There, of course, is a right to a further hearing with respect to debarment. It is only a temporary suspension that is before us, and it is as to that action that we find the proffered hearing was appropriate and sufficient.

The contractors point out that if they are ultimately vindicated, they will be unable to recoup profits they might have made under contracts with the State[4], and add that in fact they have heretofore relied heavily upon public work. We are mindful that such losses cannot be recov-

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[4] Absent statute, public officers suspended because of an indictment are also without remedy even though acquitted on the trial of the indictment. See *De Marco* v. *Bergen County, supra,* 21 N. J. at 140-144; *Winne* v. *Bergen County, supra,* 21 N. J. at 315-16.

ered, but the bidding structure, we repeat, is for the benefit of the public, and we see no basis for differentiation among prospective bidders on the basis of the volume of their public contracts. The economic problem must remain theirs. It lies with them to do what they can to alleviate their situations. They might on that account accept the opportunity offered by the Commissioner to explain away the criminal charges, or they might decide to press for a prompt trial of the indictments. But we see no sound basis to compel the State to do business with a person when his responsibility is thus questioned by an indictment.

The contractors say that a temporary suspension, even if consistent with our statutes, nonetheless offends due process of law. We think the considerations already discussed dispel a claim of fundamental unfairness. We are not referred to any case holding the other way.

The power of government to debar a bidder pending a later hearing was recognized in *Goldberg* v. *Kelly*, 397 U. S. 254, 25 L. ed. 2d 287 (1970). There five members of the Court held that welfare recipients could not be removed from the rolls until after an appropriate hearing with respect to their continued eligibility to receive aid. The majority, however, recognized that "some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing." 397 U. S. at 263, 25 L. ed. 2d at 296. In footnote 10 at the page just cited, the majority noted that in *R. A. Holman & Co.* v. *SEC*, 299 F. 2d 121, 131 (D. C. Cir. 1962), *cert. denied*, 370 U. S. 911, 8 L. ed. 2d 404 (1962), the Court of Appeals said that "In a wide variety of situations, it has long been recognized that where harm

to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." As an "example," footnote 10 cites "Gonzalez v. Freeman, 118 U. S. App. D. C. 180, 334 F. 2d 570 (1964) (disqualification of a contractor to do business with the Government)." The reference, of course, is to the *Gonzalez* case we have already discussed. In holding that a pretermination hearing was required as to continued welfare eligibility, the majority in *Goldberg* v. *Kelly* stressed the extreme need of the individual and found that important governmental interests were concurrently advanced by such a pretermination hearing. In discussing the essential needs of the welfare recipient, the majority noted that that "factor" was "not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended." 397 U. S. at 264, 25 L. ed. 2d at 297. These observations support our view that there is no serious basis for a due process claim in the cases before us.

One matter remains. It will be recalled that after the suspension Trap Rock was found to be low bidder on bids theretofore submitted. The question is whether a distinction can be drawn between the right of Trap Rock to bid and its right to receive an award under bids already in. We see no basis for a distinction. The public interest in the State's contracts is no less demanding because bids have been submitted. N.J.S.A. 27:7-35.8 expressly contemplates rejection of a bid on the basis of developments after prequalification. It follows that in such circumstances the procuring authority, after giving the low bidder such opportunity to dissipate the impact of

the indictment as the public need will permit, may, upon the low bidder's failure to do so, make an award to the next low bidder.

The judgments of the Appellate Division are reversed and the actions of the Commissioner are affirmed, without prejudice, of course, to the right of the contractors to a hearing with respect to final debarment when such a hearing becomes feasible.

APPENDIX G

Determination of New Jersey Commissioner of Transportation (June 29, 1973)

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

In the Matter of

TRAP ROCK INDUSTRIES, INC., and
MICHAEL J. STAVOLA.

HEARING ON REINSTATEMENT OF PREQUALIFICATION CLASSIFICATION

DETERMINATION OF THE COMMISSIONER

This matter had been brought before the Department of Transportation under N.J.S.A. 27:7-35.8, pursuant to which the Commissioner issued a Determination of the Commissioner dated March 16, 1972. That determination debarred Trap Rock Industries, Inc., from bidding on any contracts to be awarded by the Department of Transportation or with any county or municipality that would utilize State funds, for a period of five years. The Determination debarred Trap Rock Industries, Inc., also from subcontracting or furnishing materials with respect to any such contract.

The recent New Jersey Supreme Court decision, argued January 23, 1973, and decided May 7, 1973, 63 N. J.

1, 1973, upheld the prior decision of the Appellate Division reported in 120 N. J. Super. 8 (1972) but also overruled the Appellate Division in that the Commissioner could debar Michael J. Stavola and his companies from bidding on county and municipal contracts, citing numerous statutes. Although an application for a stay was filed with the United States Supreme Court and subsequently denied, both sides stipulated at this hearing on June 14, 1973, that neither would waive any position it may have on any applications for certiorari to the United States Supreme Court.

This hearing was held as to another aspect of the Commissioner's prior determination of debarment, that Trap Rock Industries, Inc., itself would be debarred from bidding for State work until Michael J. Stavola divested himself of all interests in that said corporation. Michael J. Stavola has indicated an intent to divest himself of said interests and Trap Rock Industries, Inc., has requested this hearing to submit proof and information that it can and should be a separate corporation to be considered for prequalification to bid on State contract work, including work as a subcontractor, materialman or on local or county work when State funds are involved.

Facts presented at the hearing show that Michael J. Stavola owned 6,918 1/3 shares of stock in Trap Rock Industries, Inc., or substantially all of the stock except that needed for statutory criteria. He entered into a sale and purchase agreement with his sons, Joseph M. Stavola and William H. Stavola, to sell the stock to them for $5 million, with a down payment of $250,000 by the sons. They will pay $250,000 annually, plus interest, for ten years, at which time the complete balance of $2,500,000 is due. They acquired this money for the down payment

from the sale of another firm owned by the sons. An accountant, Martin J. Epstein, testified as to the method of valuation, books, records, stocks, corporate interrelationships, if any, and agreed to allow the Department to review the following years' Internal Revenue Service returns of Michael J. Stavola. The new owners are Joseph M. and William H. Stavola, Incorporated, a corporation of New Jersey, and one completely apart and separate from Michael J. Stavola. No side or unwritten agreements exist, according to all three Stavolas who were placed under oath. Michael J. Stavola owns no shares of stock in a subsidiary corporation. He will retain ownership in the Delaware River Land Co., a firm that leases some quarry equipment to Trap Rock Industries, Inc., on a net lease basis with Trap Rock Industries, Inc., assuming all expenses other than straight rental. The Delaware River Land Co. also owns some surrounding non-quarry land that is leased to Trap Rock Industries, Inc., on a net lease basis. It is leased to prevent complaints by any surrounding landowners or any future developments. Both the agreement and notes, and also a draft pay order, have been supplied to the Department.

If a default occurs, then Michael J. Stavola will have to sue on the note since he cannot recover the stock itself from his sons. No escrow will be held by either side and no major changes in ownership of equipment, labor, lease or land, or whatever, were made for this exchange.

Testimony of Michael J. Stavola, under oath, showed an interest to completely sell all stock of Trap Rock Industries, Inc., and a desire not to be directly or indirectly involved in any day-to-day operations of Trap

Rock Industries, Inc. He affirmed that he would sue on notes, get no stock back and never go back into any aspect of the Trap Rock Industries, Inc., business in the future. He stated he had owned 98% of the stock and would resign all positions as an officer or official of this firm. He further stated he would have no interest in any corporation doing business with any local governmental entity or the Department of Transportation of New Jersey. He affirmed the amount of sale and that no further agreement exists either oral or in writing. Also he would not be eligible to collect any pension from Trap Rock Industries, Inc.

Both sons, Joseph M. Stavola and William H. Stavola, testified under oath that this agreement was the full agreement and there exists no other oral or written understanding between the father and the two sons and furthermore, that the father would have no part in the day-to-day operations of Trap Rock Industries, Inc. In addition, bonding would not be a problem since it is based on the assets of Trap Rock Industries, Inc., itself.

Therefore, I find as follows:

I have been given broad discretion under the statutes to determine who are responsible bidders and I have previously exercised that discretion in this very matter, which was upheld by the highest court of the State of New Jersey. The moral integrity and moral worth of the bidder is critical to an evaluation of his qualifications to bid. *Arthur Venneri Co.* v. *Paterson Housing Auth.*, 29 N. J. 392, 403 (1959). It is my obligation, not only to exercise my discretion fully as to all bidders alike, but also to insure that the construction program of the State be carried out expeditiously for the benefit of the citizens and the State itself. The privi-

lege of doing business with the State rests upon those who can establish to my satisfaction the qualifications, responsibility and integrity necessary to justify the granting of that privilege. The divestation of ownership and the removal of an officer, principal or owner directly related to the reason for the debarment, with no recourse to that individual to regain any control, whether economic, family or business, is essential to the reinstatement of a firm or business entity of the right to do business with the State of New Jersey. The record discloses that the divestiture and the removal of Michael J. Stavola from ownership and control of Trap Rock Industries, Inc., has been established as actual and complete so that no action or decision of Trap Rock Industries, Inc., its officers or employees, can be influenced by Michael J. Stavola.

Therefore, it is hereby ordered that Trap Rock Industries, Inc., be hereby reinstated to its prime position of bidding upon contracts for State construction projects, both with the Department of Transportation and with local authorities under State aid projects, and also as a subcontractor, materialman and supplier, subject to its meeting the qualifications as set forth by the appropriate State statutes and regulations of the Department of Transportation. If, at any time in the future, Michael J. Stavola acquires any interest in Trap Rock Industries, Inc., the period of debarment shall automatically be reinstated against Trap Rock Industries, Inc.

JOHN C. KOHL
Commissioner of Transportation

Dated: June 29, 1973

APPENDIX H

Affidavit of Justin P. Walder (July 14, 1972)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-1805-71

Civil Action

TRAP ROCK INDUSTRIES, INC., STA-SEAL; M. J. STAVOLA MANUFACTURING; M. J. STAVOLA INDUSTRIES, INC.,

Appellant-Movants,

vs.

JOHN C. KOHL, NEW JERSEY COMMISSIONER OF TRANSPORTATION,

Respondent.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

JUSTIN P. WALDER, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a member of the firm of Schapira, Steiner & Walder, attorneys for the Appellants-Movants, and I am personally familiar with the within matter. In addition, I personally handled the matter of Trap Rock Industries, Inc. v. Kohl, reported in 59 N. J. 471 (1971).

Appendix II

2. On June 30, 1972 I spoke with the Honorable Milton B. Conford, Senior and Presiding Judge of Part B of the Superior Court, Appellate Division, and indicated that I had additional information that I believed to be pertinent and material to the Court's consideration of the within appeal. I was advised by Judge Conford that he would review my request to present additional information with other members of the Court and that I would be further advised as promptly as possible. Judge Conford notified the undersigned on June 30, 1972 that he had reviewed my request with the other members of the Court, and since the decision had been mailed to the Clerk of the Court prior to my telephone call and would in all probability be released on the next Court day, which was July 5, 1972, the request would be denied without prejudice to the right of the Appellants upon receipt of the Opinion to file the within application.

3. It is respectfully submitted that the new and additional facts and information hereinafter referred to shall clearly demonstrate that the represented policy of the State of New Jersey that "doing business with the State is a privilege that should be accorded to those who establish to our satisfaction their qualifications, responsibilities, and integrity" is not in fact an existing policy, or if such a policy exists, it is being arbitrarily and capriciously enforced without uniform minimum fairness to all, and more specifically, in a discriminatory fashion to the improper detriment of the Appellants.

4. The following are matters of public record that set an appropriate background for the consideration of the within application:

Appendix H

(a) On May 7, 1971 Commissioner of Transportation for the State of New Jersey in the matter of Trap Rock Industries, Inc. stated, *inter alia*:

> "It is my obligation to exercise that discretion in a manner that applies fairly to all prospective bidders. It is also my obligation to take measures to insure that the construction program of the State will be carried out expeditiously and faithfully by the contractors with whom this Department does business. In our view doing business with the State is a privilege that should be accorded to those who establish to our satisfaction their qualifications, responsibility and integrity."

The Commissioner of Transportation further stated in the above Order:

> "The fact that the offense stated in the indictment concerned bribery of Government officials is particularly noteworthy. In our view, such dealings with another Government agency are as reprehensible as if such dealings were with this particular Department. This is especially so when both agencies are part of State government and are but two arms of a single branch. It is indicia of conduct by the contractor in his dealings with Government entities."

(b) The State in its brief filed with this Court in the prior *Trap Rock Industries, Inc.* v. *Kohl,* Docket No. A-1458-70, stated insofar as the weight to be given to allegations of conduct as set forth in an indictment:

> "The offenses stated in the indictments concern bribery of government officials and are therefore

particularly noteworthy. It is indicative of the conduct of appellants in their respective dealings with government entities." (Page 8)

The State further contended in its brief in the above matter relating to administrative punishment as distinguished from the punishment provided for by the criminal laws as follows:

"It simply adds an additional remedy to serve an area of the public interest which is separate and distinct from that which the criminal law is concerned; i.e. that the State not be required to do business with parties whose moral integrity is in doubt." (Page 30)

(c) The State in its brief in support of its Petition for Certification in Trap Rock Industries, Inc. filed on July 16, 1971 stated as follows:

"Each of these suspensions have been based on charges that company officials had made or attempted to make payments to public officials to induce the corrupt performance of official duties." (Page 3)

Moreover, on Page 10 of this brief the State indicated:

"The citizens of New Jersey deserve a better fate than to have their tax monies risked in ventures with parties of questionable integrity. Although the contracts themselves contain some safeguards, it is impossible for the State to control all aspects of a contractor's performance. In this field of endeavor where it is so easy to cut corners, it is essential that the state be absolutely certain of the integrity of the parties with whom it deals."

(d) More recently the State in March 1972 filed a brief in opposition to the Appellants' application for a stay of the Commissioner's Order in the within matter, and again set forth the alleged policy of the State of New Jersey as follows:

> "Thus the legitimate overriding concern of the State is that in the expenditure of public moneys, there must be the utmost care in choosing the business partners of the State and of the contractors doing work for the State." (Pages 7, 8)

Moreover, this alleged policy of the State of New Jersey was supported by a sworn affidavit dated March 8, 1972 signed by Commissioner of Transportation John C. Kohl in which he stated:

> "Business dealings with these appellants would expose the New Jersey Department of Transportation and the public to the risk of a lack of integrity in the contractor's dealings with the Department of Transportation and the handling of public funds."

and further, "* * * would serve to erode public confidence in the Department of Transportation * * *."

(e) The State in its brief and argument presented to this Court on May 1, 1972 in the within matter stated that it is the policy of the State of New Jersey that the government will do business only with men of integrity, and further,

> "It is imperative that the State be able to rely on the integrity of all persons with whom it does business, not just the ones with whom it contracts." (Page 20)

Appendix II

In addition, the State set forth in the above brief the philosophy behind this alleged policy by stating:

> "The Commissioner's debarment order represents an administrative judgment that the State is better off doing business with fewer contractors all of whom are of impeccable character, than being ablo to choose from more contractors of less certain moral integrity. Of course, the judiciary should interfere with such a determination only when it is plainly demonstrated to be arbitrary." (Page 23)

Indeed, the instant application is based upon facts previously unknown and not disclosed by the State of New Jersey which it is submitted establishes arbitrariness and discrimination.

(f) On or about April 19, 1972 a Federal Grand Jury for the District of New Jersey returned an indictment containing 98 pages detailing and setting forth allegations of conduct engaged in by Frederic R. Harris Inc., its officers and its agents with the consent of Frederic R. Harris Inc., its officer and its agents, relating to the performance by that firm of engineering and consulting services for the New Jersey Highway Authority pursuant to contracts for the construction, engineering, maintenance, repair and improvement of the Garden State Parkway. The firm of Frederic R. Harris Inc., its officers and its agents, are not named as defendants, but it is alleged that they participated in the carrying on of unlawful activity specifically set forth in the indictment as being the crimes of bribery and extortion in violation of the laws of the State of New Jersey and that such unlawful activity pertained to the awarding by New

Jersey Highway Authority of contracts for the construction, engineering, maintenance and improvement of public projects. In addition, the indictment alleges the participation of the Frederic R. Harris Inc. firm in making of false and fictitious documents for the purpose of hiding and concealing the alleged bribery, extortion and conspiracy. The indictment further alleges that from on or about July 1, 1965 to February 28, 1971 the firm of Frederic R. Harris Inc. was engaged in performing engineering and consulting services for the New Jersey Highway Authority pursuant to contracts for the construction, engineering, maintenance, repair and improvement of the Garden State Parkway, and that during and within the aforementioned period made illegal payments both in cash and by check directly relating to the bribing of public officials dealing with the area of public contracting in the sum of $144,000.00.

In addition, although not encompassed within the aforementioned indictment, but within the time period encompassed by the indictment, Frederic R. Harris Inc. entered into public contracts with the State of New Jersey including, but not limited to, the Department of Transportation.

(g) Notwithstanding and following the Grand Jury findings as to the facts concerning Frederic R. Harris Inc. referred to in sub-paragraph (f), all of which were known by responsible officials of the State of New Jersey, the following has occurred: (1) the New Jersey Sports and Exposition Authority of which the Attorney General of the State is a member recently approved and granted to the Harris firm a contract of approximately $10,000,000; (2) the Department of Transportation publicly announced an award of a contract to the Harris firm in the sum

of $855,000, but this public announcement occurred approximately eight months following the award; (3) Department of Transportation on June 17, 1972 contracted with the Harris firm relating to design work on a project relating to Highway Route 17; (4) on June 21, 1972 the Harris firm was awarded a contract by the Department of Transportation in the sum of approximately $54,000 relating to an environmental impact study; (5) it is verily believed that the Department of Transportation has approved a State aid project with the County of Somerset involving the Harris firm, and in addition, the Harris firm has been permitted to continue to do business with various other agencies of the State of New Jersey.

5. The decisions rendered by this Court as well as the prior determination by the Supreme Court were all based on representations relating to an unwritten policy of the State of New Jersey as well as the unwritten specific administrative policy of the Department of Transportation in relation to entities doing business with the State. The concept of doing business with people of integrity is not being questioned by the Appellants. The sole issue raised by the instant application relates to the right of all citizens, including the Appellants, to receive uniform fairness and not to be treated in an arbitrary, unequal and discriminatory manner. The supervision of this Court to protect and assure these rights becomes all the more essential in view of the fact that the represented policy relating to the subject matter of debarment and the method of imposing the same (all of which was not before the Supreme Court of New Jersey) has never been set forth, either by the Legislature in any Statute or by any agency of the State in uniform rules and regulations to assure uniform fairness to all and to

avoid a case by case improvisation leading to the discriminatory treatment and effects referred to herein. This is particularly so in areas of public contracting and competitive bidding where statutes have been enacted to protect the public good and to guard against "favoritism, improvidence, extravagance and corruption."

6. In view of the clear evidence of discriminatory and unequal treatment in the sensitive area of public contracting and to assure that improper influences shall not infect this area, a rehearing and further review are mandated.

7. In the event this Court determines that a further record is necessary prior to a ruling on the within application, Appellants-Movants respectfully request the opportunity to establish before an impartial body full substantiation of the facts contained in the within affidavit, as well as an opportunity to present such additional evidence to further establish a pattern of arbitrary and discriminatory application of the alleged State policy relating to the area of public contracts and the use of improper influences.

8. The within application is submitted in good faith and not for the purposes of delay.

(s) JUSTIN P. WALDER

(Sworn to July 14, 1972.)

APPENDIX I

Letter of Justin P. Walder to Supreme Court of New Jersey (January 18, 1973)

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Telex Number
Newark 138525

January 18, 1973

Hon. The Chief Justice and Associate Justices
Supreme Court of New Jersey
State House Annex
Trenton, New Jersey

Re: Trap Rock Industries, Inc., et al v. John C. Kohl
Docket No. A-78/79

Honorable Sirs:

Counsel in the above case have been advised that oral argument before this Court will be on Tuesday, January 23, 1973, at 10:00 A.M.

Appendix I

Appellants' position, as expressed before the Appellate Division and in the Cross-Petition for Certification filed with this Court, is that there is clear evidence of discriminatory and unequal treatment of public contractors by the New Jersey Department of Transportation. It is submitted that such discriminatory treatment is the inevitable result of an administrative agency such as the Department of Transportation failing to promulgate suitable standards and regulations to govern the matter of contracting and qualification to contract.

In an affidavit dated July 14, 1972 (supplemental appendix on cross-petition for certification, p.p. 120sa to 127sa), it was pointed out that a Federal Grand Jury for the District of New Jersey had returned an indictment which, *inter alia,* described the participation of the Frederic R. Harris Inc. firm and its officers in certain specified illegal activity.

More recently, a Federal Grand Jury of New Jersey returned an indictment against a former Treasurer of New Jersey. That indictment names as a co-conspirator one Edward J. Quirin, who at the times listed in the indictment was the President of Frederick R. Harris Inc. and who allegedly was involved in a kickback scheme with the named defendant in return for the latter's assistance in obtaining State contracts.

Despite the affidavit to which I have made reference herein and the recent Federal indictment of the former Treasurer of New Jersey, Frederick R. Harris Inc. continues to be permitted to contract with the State and to qualify as a bidder on State contracts. To our knowledge, no hearing has ever been held into the qualifications of Frederick R. Harris Inc. and no effort to respond to my affidavit has ever been made by any official of the State of New Jersey.

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On June 27, 1972, a Federal indictment named, *inter alia*, one Michael J. Manzo as a defendant in a case involving an attempt to influence the Department of Transportation in the awarding of a contract. There has been a conviction of the said defendant on this charge, and yet, the company of which he was President, Manzo Contracting Company Inc., continues, according to a letter which has just recently come into our possession, to be qualified to contract in work involving State aid and to supply materials to local agencies and contractors doing local government work. A copy of that letter is attached hereto for the information of the Court.

It is respectfully submitted that the matters set forth in this letter support the contention made on behalf of appellants that there is a clear denial of equal protection resulting from the rulings of the Commissioner of the Department of Transportation, which rulings have been and continue to be made in the absence of specific guidelines and standards.

It is urged that the guiding hand of this Court is needed to remedy this situation and to assure that no individual or company is denied economic freedom through the application of an amorphous or indeed absent set of standards.

Respectfully submitted,

JUSTIN P. WALDER
Attorney for Appellants

JPW:mg

APPENDIX J

Relevant Provisions of New Jersey Department of Transportation *Standard Specifications for Highways and Bridge Construction.*

1.1.3. Definitions.

* * *

BIDDER, an individual, firm, partnership or corporation, acting directly or through a duly authorized representative, legally submitting a Proposal.

* * *

CONTRACT, the agreement covering the performance of the Project and payments therefor, including Advertisement for Proposal, Proposal, Certification as to Publication and Notice of Advertisement for Proposal, Appointment of Agent by Nonresident Contractors, Noncollusion Affidavit, Warranty Concerning Solicitation of the Contract by Others, Progress Schedule, Resolution of Award of Contract, Executed Form of Contract, Contract Bond, Standard Specifications, Supplementary Specifications, Plans, Change Orders, Supplementary Agreements, and letters or other information giving interpretations or revisions of any of the foregoing documents which are mailed to prospective bidders not less than 3 days prior to the date scheduled for the receipt of bids, all of which are to be treated as one instrument whether or not set forth at length in the form of Contract.

CONTRACTOR, the party of the second part to the Contract, acting directly or through agents or employees, and *primarily liable for the acceptable performance of the Project* and for the payment of all debts pertaining to the Project.

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COUNTY AND MUNICIPAL PROJECTS shall mean projects carried out with County or Municipal Aid from the State, for which the *County or Municipality, and not the State, is the contracting party.*

• • •

PROJECT, the entire work to be performed under the Contract.

PROPOSAL, the prepared form furnished by the Department, properly filled out and executed and submitted as a bid for the performance of the Project.

• • •

1.3.7. Subletting and Assigning Contract.

The Contractor shall not sell, transfer, assign, hypothecate or otherwise dispose of the Contract to any other party. The Contractor shall perform with his own organization and with the assistance of workmen under his immediate superintendence work amounting to not less than 50 per cent of the Total Price bid for the Project, exclusive of speciality items not commonly found in contracts for similar work or which require highly specialized knowledge, craftsmanship or equipment, not ordinarily available in the organization of contractors performing work of the character embraced in this Contract. Speciality items, if any, shall be as set forth in the Supplementary Specifications. Where the value of the work to be sublet is $25,000 or more, subletting will be permitted only to *subcontractors prequalified with the Department.*

• • •

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Subject to the above provisions and to the consent of the Commissioner, work may be sublet. It is understood however, that any consent of the Commissioner for the subletting of any of the work of the contract in *no way relieves the Contractor from his full obligations under the Contract.* The consent to sublet any part of the work shall not be construed to be an approval of the said subcontract or of any of its terms, but shall operate only as an approval of the Contractor's request for the making of a subcontract between the Contractor and his chosen subcontractor.

The subcontractor shall look only to the Contractor for the payment of any claims of any nature whatsoever arising out of the said subcontract, and said subcontractor agrees, as a condition of the Commissioner's consent to the making of said subcontract, that he shall make no claim whatsoever against the Commissioner or his agents or employees for any work performed or thing done by reason of said subcontract, or for any other cause whatsoever that may arise by reason of the relationship created between the Contractor and subcontractor by the subcontract. The Commissioner will not consent to the making of any subcontract unless the proposed subcontractor furnishes a statement to the effect that said subcontractor is acquainted with all the provisions of the Contract and agrees thereto.

* * *

1.4.7. Materials.

General. *All materials for the Project shall be furnished by the Contractor,* unless otherwise specifically prescribed. They shall conform to the Plans and Specifications, and shall be from approved sources. Only materials which have been approved by the Engineer shall be used.

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Within 12 hours after receiving a shipment of materials, the Contractor shall advise the Engineer of the kind, size, quantity and location thereof.

Approval of Source. Promptly after the execution of the contract the Contractor shall notify the Engineer, on forms furnished by the Department, of the sources of materials he expects to use during the 6 month period thereafter. Such notice shall be received by the Engineer at least 10 days prior to the shipment of materials from a *previously approved source* and at least 30 days prior to the shipment of materials from a source not previously approved except that, *with the Engineer's consent, shipments of materials from approved stocks may be made 3 days after notice to the Engineer.* For materials which are not required until more than 6 months after the execution of the Contract the Contractor may delay such notice until 1 calendar month prior to the date that such materials need to be ordered so that they will be available for the Project at the proper time. In any item of construction the sources, brands or types of materials shall not be changed without the consent of the Engineer. The Contractor's request for such changes shall be filed with the Engineer the number of days in advance of such changes as required above. The Contractor's notice shall state the name and address of the owner, the location of the proposed source, the method of shipment, and the intended use of the material. The Contractor also shall furnish this information for all materials whenever he places an order therefor. The foregoing provisions shall apply also with regard to requests by subcontractors for the sources of the materials they propose to use, such requests to be submitted through the Contractor.

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Inspection. *Materials shall be inspected at their source and approved before being shipped.* Shipment before approval shall be sufficient cause for rejection. Approval applies only *so long as the materials conform to requirements of the Specifications, are uniform in quality and composition and can be supplied at the time and in the quantities required.* Approval for a specific case or use shall not imply approval for other cases or uses. At the discretion of the Engineer, permission may be granted to ship materials which may be inspected upon arrival at the job site, but in no case shall materials be used until approved by the Engineer. Approved materials which appear defective when received or which may have been damaged in storage or handling shall not be used until retested and reapproved. Orders placed with producers or jobbers for materials shall provide a detailed description and the intended use of the materials, the official designation of the project for which they are to be used, and that the materials shall be in accordance with the Plans and Specifications for that project and be subject to inspection, test, and acceptance by the New Jersey State Highway Department. A copy of all orders shall be furnished the Engineer at the time the order is placed.

• • •

1.5.5. Inspectors.

The State shall have the right to inspect all work done and all materials furnished, including the preparation, fabrication and manufacture in mill, plant, shop and field of the materials to be used, and may assign an Inspector or other authorized representative for this purpose. *The Contractor shall provide all facilities necessary for such inspection* and shall furnish or cause to be furnished to the said Inspector or other authorized representative safe

access at all times to the places where preparation, fabrication or manufacture of materials and construction of the work is in progress, as well as such information and assistance as may be required to make a complete and detailed inspection. When the said Inspector or other authorized representative is in or about the premises above referred to in the course of his employment, he shall be deemed conclusively to be an invitee of the Contractor. If the Contractor be not the owner of the place where fabrication, preparation or manufacture is in progress, the owner thereof shall be deemed to be the agent of the Contractor with respect to the obligation assumed hereunder. The Contractor or his agent shall be responsible for the payment of claims for injuries to the State's authorized representative due to negligence on the part of the said Contractor or his agent. The cost of providing the necessary facilities, information, assistance and protection and of satisfying claims for injuries to the State's representative, as specified above, shall be included in the prices bid for the various items scheduled in the Proposal.

Inspectors or other authorized representatives may be stationed on the work to report to the Engineer as to the progress thereof and the manner in which it is being performed; to inform him whenever it appears that the materials furnished and the work performed by the Contractor fail to conform to the requirements of the Plans and Specifications; and to direct the attention of the Contractor to such failure. The inspection, however, shall not relieve the Contractor from his obligations to furnish materials or perform work in conformity with the requirements of the Plans and Specifications. The Contractor shall provide safe transportation for Inspectors to dredges and boats used for procuring or delivering materials to the Project.

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The Inspector or other authorized representatives is not authorized to revoke, alter, enlarge, relax or release any requirements of the Specifications or to issue instructions contrary to the Plans and Specifications. If a difference of opinion arise between the Inspector and the Contractor relating to the materials furnished or the performance of the work, the Inspector has the authority to reject the materials and notify the Contractor that further work on the construction involved will be unauthorized and subject to nonpayment until the question at issue can be referred to and decided by the Engineer.

1.5.6. Unauthorized or Defective Work.

The Contractor shall use no materials in the work before they have been approved as provided in Art. 1.4.7; • • • Work performed and materials furnished which do not conform to the requirements therefor will be rejected and shall be removed, replaced or repaired as the Engineer may direct and in a manner satisfactory to him, at the Contractor's expense. Materials which have been rejected, the defects of which have been subsequently removed or corrected, shall not be used unless approved by the Engineer.

1.6.6. Responsibility for Work.

The Contractor assumes full responsibility for materials and equipment employed in the construction of the Project and agrees to make no claim against the State for damages to such materials and equipment from any cause whatsoever. Until its final acceptance, the Contractor shall be responsible for damage to or destruction of the Project, or to any part thereof, due to any cause except as otherwise hereinafter specified. • • •

APPENDIX K

Pertinent Provisions of Federal Procurement Regulations

SUBPART 1-1.6—DEBARRED, SUSPENDED, AND INELIGIBLE BIDDERS

§ 1-1.600 Scope of subpart.

This subpart prescribes policies and procedures relating to: (a) The debarment of bidders for cause; (b) the suspension of bidders for cause under prescribed conditions; and (c) the placement of bidders in ineligibility status under section 1 of the Walsh-Healey Public Contracts Act (41 U.S.C. 35). It is directly applicable to executive agencies in negotiated or advertised purchasing and in contracting for the construction, repair, alteration, destruction, or dismantlement of public works or buildings. Other Federal agencies are requested to comply therewith in conducting their purchasing and contracting operations.

§ 1-1.601 General.

Debarment, suspension, and placement in ineligibility status are measures which may be invoked by the Government either to exclude or to disqualify bidders and contractors from participation in Government contracting or subcontracting. These measures should be used for the purpose of protecting the interests of the Government and not for punishment. To assure the Government the benefits to be derived from the full and free competition of interested bidders, these measures should not be instituted for any time longer than deemed necessary to protect the interests of the Government, and should preclude awards only for the probable duration of the period of non responsibility.

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§ 1-1.601-1 Definitions.

(a) "Debarment" means, in general, an exclusion from Government contracting and subcontracting for a reasonable, specific period of time commensurate with the seriousness of the offense or failure, or the inadequacy of performance. However, in connection with Executive Order 10925 as amended by Executive Order No. 11114 and as implemented by the rules and regulations of the President's Committee on Equal Employment Opportunity, the term debarment also means an exclusion from Government contracting or subcontracting for an indefinite period of time pending the elimination of the circumstances for which the exclusion was imposed.

(b) "Suspension" means a disqualification from Government contracting and subcontracting for a temporary period of time because a concern or individual is suspected upon adequate evidence (see § 1-1.605) of engaging in criminal, fraudulent, or seriously improper conduct.

(c) "Placement in ineligibility status" means a disqualification from Government contracting and subcontracting pending the elimination of the circumstances which constitute the basis for the imposition of the disqualification. Ineligibility under section 1(a) of the Walsh-Healey Public Contracts Act (41 U.S.C. 35(a)) refers to a situation where the Secretary of Labor has determined a concern or individual to be ineligible to receive procurement contracts for specified materials, articles, or equipment in excess of $10,000 because such concern or individual does not qualify as a "manufacturer" or "regular dealer" within the meaning of that

Act. Such ineligibility status remains in effect until rescinded by the Secretary of Labor.

(d) A "debarment list" or "debarred bidders' list" means a list of names of concerns or individuals against whom any or all of the measures referred to in this section have been invoked.

(e) "Affiliates". Business concerns are affiliates of each other when either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both.

• • •

§ 1-1.602-1 Bases for entry on the debarred, suspended, and ineligible list.

Entry shall be made on the debarred, suspended, and ineligible list of firms or individuals on the following bases:

(a) Those listed by the Comptroller General in accordance with the provisions of section 3 of the Walsh-Healey Public Contracts Act (41 U.S.C. 37), which have been found by the Secretary of Labor to have violated any of the agreements or representations required by that Act.

(b) Those listed by the Comptroller General in accordance with the provisions of section 3 of the Davis-Bacon Act (40 U.S.C. 276a-2(a)), as found by the Comptroller General to have violated said Act.

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(c) Those listed by the Comptroller General in accordance with the provisions of Part 5, section 56(b) of the Regulations of the Secretary of Labor issued pursuant to authority granted under Reorganization Plan 14 of 1950, as found by the Secretary of Labor to be in aggravated or wilful violation of the prevailing wage or overtime pay provisions of any of the following statutes—

(1) Davis-Bacon Act (40 U.S.C. 276a).

(2) Anti-Kickback Act (18 U.S.C. 874, 40 U.S.C. 276b, c).

(3) The Contract Work Hours Standards Act (40) U.S.C. 327-330).

(4) National Housing Act (12 U.S.C. 1703).

(5) Hospital Survey and Construction Act (42 U.S.C. 291).

(6) Federal Airport Act (49 U.S.C. 1101).

(7) Housing Act of 1949 (42 U.S.C. 1401).

(8) School Survey and Construction Act of 1950 (20 U.S.C. 251).

(9) Defense Housing and Community Facilities and Services Act of 1951 (42 U.S.C. 1591).

(10) Federal Civil Defense Act of 1950 (50 App. U.S.C. 2281 (i)).

(11) Area Redevelopment Act of 1961 (42 U.S.C. 2518).

(12) Delaware River Basin Compact (sec. 15.1, 75 Stat. 714).

(13) Health Professions Educational Assistance Act of 1963 (sec. 721, 77 Stat. 167).

(14) Mental Retardation Facilities Construction Act (secs. 101, 122, 135, 77 Stat. 282, 284, 288).

(15) Community Mental Health Centers Act (sec. 205, 77 Stat. 292).

(d) Those the executive agency determintes to debar administratively for any of the causes and under all of the appropriate conditions listed in § 1-1.604.

(e) Those debarred by the President's Committee on Equal Employment Opportunity, or by the head of the agency (with the prior approval of the Committee), from participation in Government contracting or subcontracting by reason of noncompliance with the Equal Opportunity Clause.

(f) Those the executive agency determines to suspend administratively for the reasons and under the conditions set forth in § 1-1.605.

(g) Those determined by an executive agency in accordance with section 3(b) of the Buy American Act (41

U.S.C. 10b(b)) to have failed to comply with the provisions of section 3(a) of that Act under any contract containing the specific provision required by said section 3(a) and made by the agency for construction, alteration, or repair of any public building or public work.

(h) Those found by the Secretary of Labor ineligible to be awarded contracts for the reason that they do not qualify as "manufacturers" or "regular dealers" within the meaning of section 1(a) of the Walsh-Healey Public Contracts Act (41 U.S.C. 35(a)).

• • •

§ 1-1.604 Causes and Conditions Applicable to Determination of Debarment by an Executive Agency.

Subject to the following conditions, each executive agency is authorized to debar a firm or individual in the public interest for any of the following causes:

(a) *Causes.* (1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract thereunder, or in the performance of such contract or subcontract.

(2) Conviction under the Federal Antitrust Statutes arising out of the submission of bids or proposals.

(3) Violation of contract provisions, as set forth below, of a character which is regarded by the agency involved to be so serious as to justify debarment action—

(i) Willful failure to perform in accordance with the specifications or within the time limit provided in the contract.

(ii) A record of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts; *Provided,* That such failure or unsatisfactory performance has occurred within a reasonable period of time preceding the determination to debar. Failure to perform or unsatisfactory performance caused by acts beyond the control of the firm or individual as a contractor shall not be oensidered to be basis for debarment.

(iii) Violation of the contractual provision against contingent fees.

(iv) Acceptance of a contingent fee, which is paid in violation of contractual provision against contingent fees.

(4) any other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the head of the agency to warrant debarment.

(5) Debarment by some other executive agency.

(b) *Conditions.* (1) Debarment for any of the causes set forth in (a) of this § 1-1.604 shall be made only upon approval of the head of the executive agency or his duly authorized representative.

(2) The existence of any of the causes set forth in (a) of this § 1-1.604 does not necessarily require that a firm or individual be debarred. In each instance, whether the offense or failure, or inadequacy of performance, be of a

criminal, fraudulent, or serious nature, the decision to debar shall be made within the discretion of the executive agency and shall be rendered in the best interests of the Government. Likewise, all mitigating factors may be considered in determining the seriousness of the offense, failure, or inadequacy of performance, and in deciding whether debarment is warranted.

(3) The existence of a cause set forth in (a) (1) and (2) of this § 1-1.604 shall be established by criminal conviction by a court of competent jurisdiction. In the event that an appeal taken from such conviction results in a reversal of the conviction, the debarment shall be removed upon the request of the bidder (unless other cause for debarment exists).

(4) The existence of a cause set forth in (a) (3) and (4) of this § 1-1.604 shall be established by evidence which the executive agency determines to be clear and convincing in nature.

(5) Debarment for the cause set forth in (a) (5) of this § 1-1.604 (debarment by another agency) shall be proper provided that one of the causes for debarment set forth in (a) (1) through (4) of this §11.604 was the basis for debarment by the original debarring agency. Such debarment may be based entirely on the record of facts obtained by the original debarring agency, or upon a combination of such facts and additional facts.

(c) *Period of debarment.* (1) Debarment of a firm or individual for causes other than failure to comply with the provisions of Equal Opportunity Clause (see § 11.602-1(e)), shall be for a reasonable, definitely stated period of

time commensurate with the seriousness of the offense or the failure or inadequacy of performance. As a general rule, a period of debarment shall not exceed three years. However, when debarment for an additional period is deemed necessary notice of the proposed additional debarment shall be furnished to that concern or individual in accordance with § 11.604.1. Except as precluded by statute, a debarment may be removed or the period thereof may be reduced by the head of the agency or by his authorized representative, upon the submission of an application, supported by documentary evidence, setting forth appropriate grounds for the granting of relief; such as, newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, or the elimination of the causes for which the debartment was imposed.

(2) Debarment of a firm or individual for failure to comply with the provisions of the Equal Opportunity Clause generally shall continue until removed by the President's Committee or by the agency itself with the concurrence of the President's Committee.

§ 1-1604.1 Procedural Requirements Relating to the Imposition of Debarment.

(a) *Initiation of debarment action.* An agency seeking to debar a concern or individual (or any affiliate thereof) for cause shall furnish that party with a written notice: (1) stating that debarment is being considered, (2) setting forth the reasons for the proposed debarment, and (3) indicating that such party will be accorded an opportunity for a hearing if he so requests within a stated period of time.

(b) *Hearings.* An opportunity for a hearing conducted in a manner prescribed by agency regulations shall be accorded to any concern or individual which the agency proposes to debar. Such regulations shall establish procedural safeguards which satisfy the demands of fairness, and which, at a minimum, shall provide that information in opposition to the proposed action may be presented, in person or in writing, and, if desired, through an appropriate representative. However, where one agency has imposed debarment upon a concern or individual, a second agency may also impose a similar debarment for a concurrent period without according an opportunity for a hearing provided that the second agency furnishes notice of the proposed similar debarment to that party, and accords that party an opportunity to present information in his behalf to explain why the proposed similar debarment should not be imposed in whole or in part.

(c) *Scope of debarment.* (1) A debarment may include all known affiliates of a concern or individual. (See §1-1.-603(a).

(2) Each decision to include a known affiliate within the scope of a proposed debarment is to be made on a case by case basis, after giving due regard to all the relevant facts and circumstances.

(3) The criminal, fraudulent, or seriously improper conduct of an individual may be imputed to the business concern with which he is connected, where such grave impropriety was accomplished within the course of his official duty or was effected by him with the knowledge or approval of that concern. Likewise, where a concern is involved in criminal, fraudulent, or seriously improper con-

duct, any individual who was involved in the commission of the grave impropriety may be debarred.

§ 1-1.605 Suspension of Bidders.

(a) Agencies electing to utilize a suspension procedure shall employ the procedure set forth in this section.

(b) Suspension is a drastic action and, as such, shall not be based upon an unsupported accusation. In assessing whether adequate evidence exists for invoking a suspension, consideration should be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as to the inferences which may properly be drawn from the existence or absence of affirmative facts. This assessment should include an examination of basic documents, such as contracts, inspection reports, and correspondence. A suspension may be modified whenever it is determined to be in the interest of the Government to do so.

§ 1-1.605.1 Causes and Conditions Under Which Executive Agencies May Suspend Contractors.

(a) An agency may, in the interest of the Government, suspend a firm or individual:

(1) Suspected, upon adequate evidence, of—

(i) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;

Appendix K

(ii) Violation of the Federal antitrust statutes arising out of the submission of bids and proposals; or

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or • • •

• • •

APPENDIX L

Notice of New Jersey Commissioner of Transportation (February 9, 1972)

STATE OF NEW JERSEY
Department of Transportation
1035 Parkway Avenue
Trenton, N. J. 08625

JOHN C. KOHL
Commissioner

February 9, 1972

Mr. Michael J. Stavola
Conover Lane
Middletown Township, New Jersey

Trap Rock Industries, Inc.
Hamilton Road
New Shrewsbury, New Jersey

Sta-Seal
Hamilton Road
New Shrewsbury, New Jersey

Middletown Equipment Company, Inc.
Chapel Hill Road
Middletown Township, New Jersey

M. J. Stavola Manufacturing
1205 State Highway 35 & Allenhurst Road
Wanamassa, New Jersey

M. J. Stavola, Inc.
Chapel Hill Road
Middletown, New Jersey

Appendix L

M. J. Stavola Industries, Inc.
1205 State Highway 35 & Allenhurst Road
Wanamassa, New Jersey

Rocky Hill Explosives Co., Inc.
Laurel Avenue
Franklin Township, New Jersey

Jesse A. Howland & Sons, Inc.
Sea Bright, New Jersey

Scientific Conversion Products, Inc.
c/o Ms. Rosland Fitler
50 Church Street
Sea Bright, New Jersey

Stavola Road Materials
Reeves Road
Bridgeton, New Jersey

South State, Inc.
P. O. Box 68
Bridgeton, New Jersey 08302

Gentlemen:

Please take notice that in light of the conviction of Michael J. Stavola in Monmouth County Court on November 22, 1971, of the crimes of bribery and obstructing justice, the Commissioner of Transportation, pursuant to N.J.S.A. 27:7-35.8 and the State Treasurer and Commissioner of Environmental Protection, pursuant to N.J.S.A. 52:35-1 et seq., together with the decision of the Supreme Court in *Trap Rock Industries, Inc.* v. *Kohl,* 59 N.J. 471 (1971), acting both jointly and severally for their respec-

tive Departments, are taking into consideration the debarment of all companies in which the said Michael J. Stavola has an interest, from bidding upon any procurement requirements with agencies of the State of New Jersey under their respective jurisdictions.

Notice is hereby given to the said Michael J. Stavola and to each and every above listed firm or concern that an opportunity to be heard on this proposed action will be afforded at the office of the Commissioner of Transportation, 1035 Parkway Avenue, Trenton, New Jersey, at 10 A.M., February 15, 1972.

Very truly yours,

JOHN C. KOHL
Commissioner of Transportation

JOSEPH M. MCCRANE
State Treasurer

RICHARD J. SULLIVAN
Commissioner of Environmental Protection

APPENDIX M

Excerpt From Transcript of Proceedings, June 14, 1973, Before Fred C. DePhillip, Assistant Commissioner

• • •

(commencing at page 4, line 20)

Mr. Walder: ". . . I think before swearing in Mr. Epstein I think we ought to at least state on the record one factor . . . We have in behalf of Trap Rock Industries, Inc. and M. J. Stavola, filed an application for a stay from Justice Brennan of the U. S. Supreme Court which was denied to my knowledge on June 8. I think each of us became aware of that situation, . . ." I think it's fair to say that Mr. Nardelli and myself based on discussion and recognizing some real urgency from the point of view of potential to the substantial number of employees of this firm, . . . I don't want to waive nor would I ask the State to waive any position it may have as to the effect of this hearing on any applications for certiorari to the Supreme Court and we proceed with the idea that each party reserves whichever positions they may have on the effect of this proceeding relative to such matter before the United States Supreme Court. I believe we touched on it.

Mr. Nardelli: Yes."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Docket No. 73-343

TRAP ROCK INDUSTRIES, INC.,

Petitioner,

vs.

JOHN C. KOHL, Commissioner of Transportation,

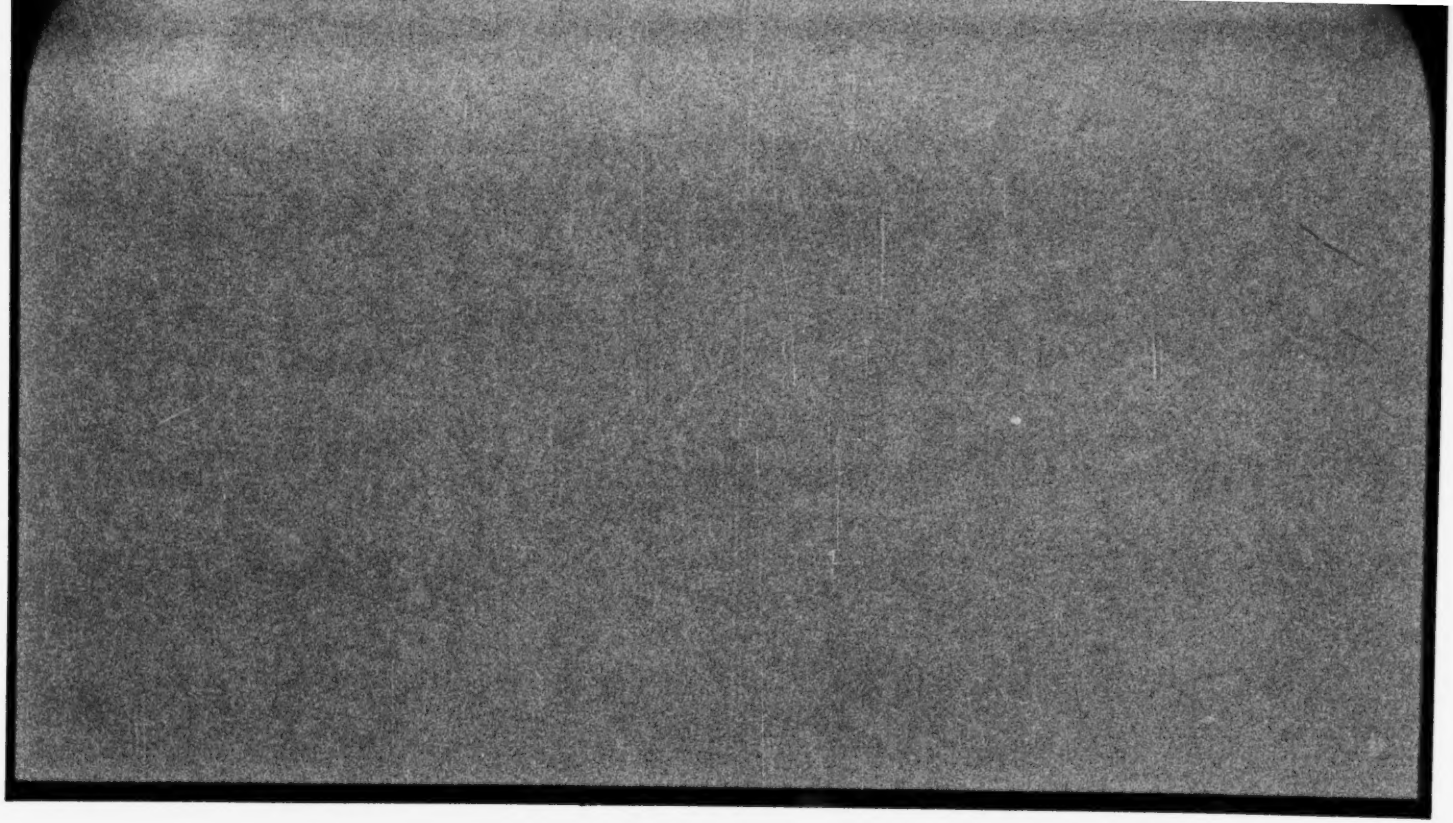
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

GEORGE F. KUGLER, JR.
Attorney General of New Jersey
Attorney for Respondent
State House Annex
Trenton, N. J. 08625

STEPHEN SKILLMAN,
First Assistant Attorney General,
Of Counsel

ALFRED L. NAGELSEN,
Deputy Attorney General,
On the Brief.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Docket No. 73-243

TRAP ROCK INDUSTRIES, INC.,

Petitioner,

vs.

JOHN C. KOHL, Commissioner of Transportation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Counter-Statement of Questions Involved

1. Should the petition for writ of certiorari, seeking review of the debarment for five years of the petitioner from doing business with the New Jersey Department of Transportation, be denied due to mootness because the petitioner has subsequently been reinstated and is once again doing business with the State?

2. Should the court consider the petitioner's claims that its debarment for five years violates due process requirements when the court has already declined to review an earlier decision of the Supreme Court of New Jersey on this identical issue?

3. Should the court consider the petitioner's claims that its debarment for five years violates petitioner's rights to equal protection of the laws when the question was not raised in accordance with the reasonable requirements of State law?

Counter-Statement of Case

On March 17, 1971, a New Jersey State Grand Jury returned an indictment charging Michael J. Stavola with attempting to bribe a State Trooper to fix criminal charges pending against Stavola, and for obstructing justice. On March 29, 1971, the petitioner Trap Rock Industries, Inc. (hereinafter "Trap Rock"), was notified that the indictment of Stavola, the principal of the corporation (80% stockholder, Chairman of the Board of Directors and President), was deemed by the Commissioner of Transportation to be a development affecting the responsibility of Trap Rock as a bidder on public works contracts with the State.

As a result of a hearing held before the Commissioner, at which Trap Rock was given the opportunity to present information to substantiate its classification as a qualified bidder, the Commissioner issued a decision on May 7, 1971, suspending Trap Rock from bidding on State contracts (See Appendix "D"). On November 23, 1971, the Supreme Court of New Jersey affirmed the action of the Commissioner (See Appendix "F"), and this Court de-

nied Trap Rock's petition for writ of certiorari, 405 U.S. 1065 (1972).

Meanwhile, on November 22, 1971, Stavola was convicted in Monmouth County Court of the crimes of bribery and obstructing justice. Stavola was sentenced on January 21, 1972 to a term of not less than one year nor more than two years. This conviction necessitated that a hearing be held to gather information regarding the State's ongoing business relations with Michael J. Stavola and any business entity with which he was associated.

At this February 15, 1972 hearing, petitioner was expressly advised that the Commissioner of Transportation was considering extending the scope of the debarment to county and municipal bodies utilizing State funds and to the supplying of materials. On March 16, 1972, the Commissioner of Transportation entered an order debarring petitioner:

> ". . . from bidding on any contracts with the Department of Transportation or any contract with county or municipal bodies which utilize or propose to utilize State funds, subcontracting on such contracts or providing materials for such contracts, for a period of five years to run from May 7, 1971 . . ." (See Appendix "C").

On July 5, 1972, the Appellate Division affirmed so much of the Commissioner's order which debarred petitioner from bidding on any contract with the Department and from supplying materials to contractors performing State contracts. However, the court reversed the Commissioner's order insofar as it debarred petitioner from participating in municipal and county work (See Appendix "B"). On May 7, 1973, the Supreme Court of New Jersey unanimously reversed that part of the Appellate

Division's judgment limiting the authority of the Commissioner of Transportation, thus reinstating in its entirety the Commissioner's debarment order (See Appendix "A").

In June of 1973, Michael J. Stavola sold all of his interest in the petitioner Trap Rock to his two sons. As a result of this divestiture, the Commissioner of Transportation ordered on June 29, 1973, that petitioner be reinstated as a prequalified contractor and Trap Rock is presently in good standing with the Department of Transportation (See Appendix "G").

ARGUMENT

POINT I

The petition for writ of certiorari to review the affirmance by the Supreme Court of New Jersey of the debarment for five years of the petitioner from doing business with the State Department of Transportation should be denied due to mootness, because the petitioner has subsequently been reinstated and is once again doing business with the State.

The issue which the petitioner seeks to bring before this Court is whether the New Jersey Commissioner of Transportation improperly debarred it from bidding on contracts to be awarded or funded by the Department of Transportation. However, the issue of the petitioner's debarment is now moot since, subsequent to the decision of the Supreme Court of New Jersey which is sought to be reviewed, the Commissioner of Transportation reinstated petitioner as a prequalified contractor, and petitioner is presently in good standing with the Department of Transportation.

An excellent illustration of this Court's refusal to give opinions upon moot questions may be found in *Local No. 8-6* v. *Missouri*, 361 U. S. 363 (1960). In that case, a labor union had appealed from a judgment of the Supreme Court of Missouri affirming a decree which enjoined the union from continuing a strike against a public utility. During the litigation the strike ended, and the injunction expired by its own terms. This Court held that the controversy was moot, stating that:

> "The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago. Any judgment of ours at this late date would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain. *Brownlow* v. *Schwartz*, 261 U.S. 216, 217, 218 . . ." 361 U. S. at 371.

Similarly, an affirmance or a reversal in the present case would also be meaningless, since the debarment in question has been terminated and petitioner has been reinstated. This Court can only order the Commissioner to reinstate petitioner, which has already been done. This Court certainly cannot order the new owners of the petitioner to sell back the company to Michael J. Stavola. Therefore the petition for writ of certiorari should be denied due to mootness.

POINT II

The petition for writ of certiorari should be denied as to the petitioner's due process claims, because this Court has already declined to review an earlier decision of the Supreme Court of New Jersey confirming the Commissioner of Transportation's authority to refuse to do business with contractors lacking the requisite moral responsibility.

Petitioner is once again before this Court arguing that its debarment violates due process requirements due to the absence of any statutory or regulatory standards setting forth the Commissioner of Transportation's authority to debar and the conduct proscribed (PS). Two years ago the Supreme Court of New Jersey expressly stated that the Commissioner of Transportation is not mandated by statute or due process requirements to specify in rules the factual patterns which spell out when a contractor will be found to lack moral responsibility. *Trap Rock Industries, Inc.* v. *Kohl*, 59 N. J. 471, 483 (1971) (App. F-44a). This Court denied certiorari. 405 U. S. 1065 (1972). A comparison of pages 13 to 24 of petitioner's petition in the first *Trap Rock* case with pages 8 to 16 of the present petition demonstrates the identity of the argument.

Petitioner attempts to distinguish *Trap Rock* I from the present case on the ground that *Trap Rock* II concerns a debarment for five years while the first case concerns a suspension. However, no such distinction is made by the Supreme Court of New Jersey. At several points in its opinion in *Trap Rock* I (e.g. 59 N. J. at 487, 490; App. F-50a, 54a), the court carefully limited its holding to suspension proceedings as opposed to debarment proceedings. However, when discussing whether due process

required any statutory or regulatory standards, the court spoke in terms equally applicable to both suspension and debarment. 59 N. J. at 483 (App. F-45a). It is significant that the opinion of the Supreme Court of New Jersey which petitioner now seeks to have reviewed makes no mention of due process claims, or of the case of *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964), relied on so heavily by petitioner in support of its due process claims in both of its petitions for writ of certiorari. Thus it is clear that the Supreme Court of New Jersey in *Trap Rock* II considered that the due process claims of petitioner had been disposed of in *Trap Rock* I.

As for the merits of petitioner's due process claims, the thrust of its argument is that Trap Rock should not have been debarred because Michael Stavola was not on notice that if he bribed a State Trooper the Department of Transportation might refuse to do business with his company. It is settled that the legislative mandate that a bidder be "responsible" embraces moral integrity. *Trap Rock Industries, Inc.* v. *Kohl, supra* at 481 (App. F-43a). As noted by the Supreme Court of New Jersey, the subject of moral integrity defies a cataloguing of all conceivable factual patterns which reveal a moral deficiency. The court added that:

> ". . . no such detailed exposition is needed. Good moral character is demanded in sundry situations without a brochure upon the topic. The standard draws specificity from each setting. So here, the nature of the subject, i.e., doing business with the State as a supplier in its procurement program, itself supplies sufficient concreteness to the concept of moral integrity." *Trap Rock Industries, Inc.* v. *Kohl, supra* at 483 (App. F-45a to 46a).

Petitioners place undue reliance upon *Gonzalez* v. *Freeman, supra,* where it was held that the Federal Administrative Procedure Act required the agency to spell out the misdeeds which would entail debarment of a licensee to participate in certain transactions under the auspices of the Commodity Credit Corporation. The Supreme Court of New Jersey has already stated that *Gonzalez* is inapplicable to the present case. *Trap Rock Industries, Inc.* v. *Kohl, supra* at 484-485 (App. F-46a to 47a). Contrary to the petitioner's contention, the basis for the court's distinguishing of *Gonzalez* had nothing to do with the fact that *Gonzalez* was a debarment as opposed to a suspension case. The court noted that in *Gonzalez* the government was not being compelled to procure its needs from a morally unfit supplier, and that the debarment from reselling surplus commodities in other countries was based exclusively upon the doing of a specific act, the misuse of an inspection certificate. The court concluded that:

> "We do not read *Gonzalez* to mean that the moral responsibility which government demands of those who would like to supply its needs must be defined in terms of detailed acts or omissions, failing which government must accept a bidder, however lacking he may be in integrity. Indeed, *Gonzalez* found it implicit that dishonesty would justify debarment, 334 F. 2d at 576-577. It would seem incongruous to say that although honesty is so vital that it is an implied requisite, a lack of it will not be a bar unless an administrator states in advance what acts or omissions cannot be reconciled with that trait". 59 N. J. at 485 (App. F-47a to 48a).

Petitioner was not debarred until after a full hearing, and until its principal had been convicted of attempting

to bribe a State Trooper. At the hearing petitioner was given full opportunity to explain why the State should do business with it. Where is the need for specificity as to moral responsibility? Petitioner certainly cannot argue that Michael Stavola became morally irresponsible because no one defined the term for him. As stated by the Supreme Court of New Jersey:

> ". . . due process does not require that the State, in its role as a purchaser, must thus canalize the discretionary power of its agents to protect the public interest in this area, and indeed at the pain of being compelled to contract for its needs with a bidder who is unfit". *Trap Rock Industries, Inc.* v. *Kohl, supra* at 485-486 (App. F-48a).

POINT III

The petition for writ of certiorari must be denied as to the petitioner's equal protection claims because the argument was not reasonably raised in accordance with the requirements of State law.

The only federal constitutional issue argued before the Supreme Court of New Jersey in the present case was petitioner's claim that it had been denied the equal protection of the laws because the Commissioner of Transportation had not debarred another company which allegedly had paid bribes to a public official. The court disposed of this argument on the grounds that it had not been properly raised below:

> "The Appellate Division properly declined to accept the issue. To begin with, an equal protection issue is not generated merely by an assertion that someone else was dealt with differently. . . . We

> do not have the facts. All we have is a naked allegation that there are no relevant differences; with no charge that the Commissioner intended an invidious discrimination. In any event, *it is inappropriate to advance the constitutional issue by a petition for rehearing on appeal and in a proceeding to which the other alleged offender is not a party*". *Trap Rock Industries, Inc.* v. *Kohl*, 63 N. J. 1, 5 (1973) (App. A-5a). (emphasis added).

The Supreme Court of New Jersey's view of the equal protection issue brings into play the well-established doctrine of independent State grounds. *Edelman* v. *People of State of California*, 344 U. S. 357 (1953). There this Court stated that it was without power to decide whether constitutional rights have been violated when the federal questions were not reasonably raised in accordance with the requirements of the State law. This Court held that non-compliance with such State law constitutes an adequate State ground for a decision below. See also, *Johnson* v. *State of New Jersey*, 384 U. S. 719, 735 (1966). Accordingly, the petition for writ of certiorari must be denied as to the petitioner's equal protection claims.

The State wishes to add that there are many relevant factual differences between the case of the petitioner and the other parties to whom he refers. However, even assuming that the facts of the cases were similar, it is clear that the government's decision to institute or not to institute legal proceedings (e.g., debarment action) is unreviewable for arbitrariness or abuse of discretion. *Newman* v. *United States*, 382 F. 2d 479 (D.C. Cir. 1967); *Peek* v. *Mitchell*, 419 F. 2d 575 (6th Cir. 1970); *Morley* v. *Wilson*, 261 Mass. 269, 159 N. E. 41 (Sup. Jud. Ct. 1927), *cert. den.* 276 U. S. 625 (1928).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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